JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 11 JULY 1974 [1]

Andreas Reinarz
v Commission of the European Communities

Joined Cases 177/73 and 5/74

Summary

1. *Officials — Resettlement allowance — Amount — Determination — Application for — Time*
   (Staff Regulations, Annex VII, Article 6 (3))

2. *Officials — Acts adversely affecting — Meaning*
   (Staff Regulations, Article 25, Article 90 and Article 91)

3. *Officials — Transitional Provisions — Transition from the former ECSC General Regulations to the ECSC Staff Regulations — Resettlement allowance — Calculation*
   (Staff Regulations, ECSC, Article 99 (3))

1. On application to terminate his service an official has an interest in requesting a definite decision as to the amount of the resettlement allowance.

2. Only those acts capable of directly affecting a precise legal situation can be regarded as adversely affecting an official.

3. A transitional provision issued on the transition to a less generous system does not normally seek to give employees greater rights than they would have had under the system which is revoked. Article 99 (3) cannot therefore be interpreted as allowing a combination of the more favourable method of calculation of one system with the more favourable salary scale of another.

In Joined Cases 177/73 and 5/74

ANDREAS REINARZ, a former official of the Commission of the European Communities, assisted and represented by A. J. Hammerstein, advocate at the Arrondissementsrechtbank, Maastricht, with an address for service in Luxembourg at the Chamber of F. Jansen, huissier, 21 rue Aldringen,

applicant and defendant in the procedural issue in Case 5/74

v

1 — Language of the Case: Dutch.

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. Giesmar, acting as agent, assisted by Seerp Ybema, of the Legal Service, with an address for service in Luxembourg at the office of Pierre Lamoureux, Legal Adviser to the Commission, 4 boulevard Royal,

defendant and applicant in the procedural issue in Case 5/74

Application for annulment of the implied rejection by the defendant of the applicant's complaint for the purpose of establishing his right, at the time of his termination of service, to a resettlement allowance equal to 4 times his final salary.

THE COURT (Second Chamber)

composed of: M. Sørensen, President of Chamber, H. Kutscher and A. J. Mackenzie Stuart (Rapporteur), Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and arguments of the parties put forward in the course of the written procedure may be summarized as follows:

I — Facts and procedure

The applicant took up his duties with the European Coal and Steel Community in 1952.

Article 47 (4) of the *Staff Regulations of the Community* (ECSC) provides that the *General Regulations of the Community* shall determine the amount of the installation and resettlement allowance. Under Article 12 of the General Regulations certain officials are entitled, on termination of their service, to a resettlement allowance equal to 4 months' salary calculated by reference to their marital status and salary at the date of termination of service, provided that they move to a district more than 25 km from the place where they were employed.

Having been transferred in the meantime to the Commission of the EEC, the applicant was covered by the provisions of Article 102 (5) of the *Staff Regulations of Officials of the EEC* which refers to the provisions of Chapter

1 of Title VIII of the *Staff Regulations of Officials of the ECSC.*

The applicant has, on the basis of this provision, the right to claim the application in his favour of 'the Transitional and Final Provisions of the Staff Regulations of Officials of the ECSC', which entered into force on 1. 1. 1962.

Article 99 (3) of these provisions provides that 'the amount of the resettlement allowance payable to an official ... who terminates his service after these Regulations enter into force, shall not be less than the amount which the official would have received under Article 12 of the former General Regulations of the ECSC.'

Under Article 6 (1) of Annex VII to the Staff Regulations at present in force, an official is entitled to only two months' salary as resettlement allowance.

On 30 March 1973 the applicant sent the following note to the Director of Personnel:

'Following a telephone conversation with Mr Ondini concerning the interpretation of Article 12 of the Staff Regulations of Officials of the ECSC I have again examined the texts relevant to this problem in addition to the interpretations given by your departments on other occasions.

I believe that the term "4 months' basic salary" which occurs in Chapter IV of the ECSC Staff Regulations can only reasonably be that applied by your departments for the purpose of the provisional calculation of the rights which former officials of the ECSC may possibly claim on the basis of Article 34 of the ECSC Staff Regulations.

I should like to know whether there is some misunderstanding here. In my opinion this problem will be of importance to a large number of officials.

For this reason I should be grateful if your final interpretation could be of a more authoritative nature.'

On 1 May 1973 the applicant was retired in the interests of the serivice.

In its note of 10 May 1973 the Commission replied as follows:

'... the sole object of Article 99 (3) of the ECSC Staff Regulations previously in force is to guarantee to officials who formerly came under those Regulations the advantages which they would have received had the termination of their service occurred before 1 January 1962. The Staff Regulations which would have been applicable to them at that time also involved the application of certain salary scales, such as were in force until 31 December 1961 ...'

In his complaint of 30 June 1973, registered with the Commission on 16 July 1973, the applicant asked the President of the Commission of the EEC to decide, by annulling the decision of the Director of Personnel, that he could avail himself of a right to a resettlement allowance equal to 4 times his basic salary.

Having received no reply, he lodged application 177/73, entered in the Court Register on 26 October 1973.

In its statement of defence, the Commission put forward a formal objection of inadmissibility for disregard of the conditions laid down in Article 91 (2) of the Staff Regulations of Officials. At the time when the application was made the complaint through the immediate superior had not yet been the subject of an implied decision of rejection even taking as the starting date the alleged date of despatch of the complaint through the immediate superior.

In order to overcome this objection the applicant brought on 30 January 1974 a new action (5/74), this time not open to objection on the basis of time limits.

By an order of the same date the Court (Second Chamber) joined the two actions for the purposes of oral and written procedure and of Judgment.

In an interlocutory application received at the Court Registry on 6 March 1974 the Commission raised an objection of inadmissibility against Application 5/74.

In case this objection of inadmissibility was rejected or a decision thereon reserved for the final Judgment, the Commission asked the Court to accept that the submissions and arguments already presented with regard to the substance of the case in Application 177/73 should remain unchanged and serve *mutatis mutandis* as observations in reply to Application 5/74.

By Order of 30 May 1974 the Court (Second Chamber) reserved for the final Judgment its decision on the objection raised in Case 5/74.

On hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Second Chamber decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

In Case 177/73 the applicant claimed that the Court should:

1. Annul, or at least declare void the Commission's implied decision of rejection of the complaint made by the applicant on 30 June 1973 and, to the extent necessary, the undated decision of the Commission contained in the letter of the Director of Personnel of 10 May 1973;
2. Decide that the applicant is entitled from the date of termination of service to a resettlement allowance equal to 4 times his final basic salary;
3. Order the Commission to pay the costs incurred by the applicant.

The defendant contends that the Court should:

1. Reject the application as inadmissible; or alternatively
2. Reject it as unfounded;
3. Order the applicant to pay the costs.

In Case 5/74 the applicant maintains his conclusions put forward in Case 177/73 and the defendant contends that the Court should:

1. Reject the application as inadmissible;
2. Order the applicant to pay the costs.

III — Summary of the submissions and arguments of the parties

Admissibility

In Case 177/73 the Commission submits that at the time when the action was brought, 26 October 1973, the complaint through the immediate superior had not yet been the subject of either an express or an implied decision of rejection. Even if the alleged date of despatch of the complaint through the immediate superior is taken as the starting date the result would be that according to the terms of the last subparagraph of Article 90 (2) of the Staff Regulations the implied decision of rejection would have been taken on 1 November 1973. The action is therefore premature. Article 91 (3) imposes a strict obligation not to file a premature appeal to the Court although an exception is made for cases of emergency provided for in Article 91 (4).

The Commission therefore asked the applicant to make a choice between continuing Case 177/73, setting aside the objection of inadmissibility, or 'bringing a fresh action, this time not open to objection on the basis of admissibility,' ... 'within the relevant period of three months from the date (17 November 1973) when the implied decision of rejection would have been taken in accordance with the Staff Regulations'.

The *applicant,* whilst recognizing that in any event the action was prematurely brought, takes the view that the fact that the defendant was subsequently deemed

to have taken a decision of rejection, which was expressly confirmed with a statement of reasons in the statement of defence, makes the application admissible. On the other hand, in the event of a decision in favour of the applicant, the costs of the appeal would have been charged to the applicant.

In the rejoinder in Case 177/73 and the interlocutory application in Case 5/74, the *defendant* puts forward a fresh submission of inadmissibility. It maintains that the applicant has no legal interest, present and in being, and that he is referring to the Court an act which, as it is limited to providing the applicant with mere administrative information regarding the content of a merely hypothetical decision, does not constitute an act which presently and indubitably adversely affects the person concerned.

This submission is based on the assumption that the applicant, having left the service on 1 May 1973, still remains at his former residence. It is for him to provide evidence that he and his family have resettled more than 70 km from the place where he was employed within three years of the date of termination of his service (Annex VII, Article 6).

The present action is therefore aimed at obtaining from the Court a merely hypothetical interpretative Judgment. It emerges from the case law of the Court that a legal interest justifying an action must not have an abstract character:

— *Bauer v Commission* (15/67, Rec. 1967, p. 511),

— *Grasselli v Commission* (32/68, Rec. 1969, p. 505).

The *defendant* also relies on national case law and legal theory.

The *applicant* in his defence with regard to the objection of inadmissibility states that in the meantime he has left his place of residence to settle in Canada. If the applicant had been required to refer the matter to the Court only after his departure for Canada he would have been in an unfavourable position with regard to procedure and his interests would have adversely affected to no avail.

Secondly the applicant takes the view that the attitude adopted by the defendant in putting forward this submission only in its rejoinder in Case 177/73 invalidates such submission.

The point of view adopted today by the defendant contradicts the one recognized by it in its statement of defence.

The applicant could not have laid himself open to the risk of allowing the defendant possibly to object against him, at a later stage, if he had not made a complaint within the prescribed period, that he was bound by a decision of the Commission.

IV — The substance of the case

According to the applicant he has a vested right to obtain from the ECSC a resettlement allowance equal to 4 times his former basic salary. At the time of his transfer from the ECSC to the EEC he had preserved his entitlement to a resettlement allowance equal to the abovementioned sum by virtue of Article 99 (3) in conjunction with Article 93 of the transitional provisions annexed to the Staff Regulations of Officials of the ECSC.

The fact that the salary scales in force on 31 December 1961 have subsequently doubled cannot be a reason for reducing the amount of the resettlement allowance to a sum of less than half 4 months' basic salary.

The doubling of the scales of salary applicable on 31 December 1961 took place simultaneously with a corresponding increase in installation expenses. It would therefore be logical to apply Article 99 (3) of the transitional provisions, taking as the point of departure the applicant's final basic salary.

The applicant believes that the attitude of the authors of the provisions in question was conditioned solely by a concern to have regard to vested rights.

The applicant stresses that the wording of the provisions in question refers clearly to Article 47 (4) of the Staff Regulations of the ECSC.

The applicant takes the view that to discover the exact interpretation of Article 99 (3) it is necessary to take into account the purpose of the remaining transitional provisions, in particular that of Articles 97, 99 (1) and (2), 101 and 102. These provisions also reveal that as regards the expatriation allowance and pension the draftsmen of the Staff Regulations were concerned to preserve intact under the new Staff Regulations rights acquired by the officials in question. The applicant feels that a certain lack of clarity in the wording of Article 99 (3) cannot be interpreted to his disadvantage because, taken as a whole and in conjunction with each other, the transitional provisions in any case give the impression that they are intended to secure and to preserve intact vested rights and claims.

The applicant therefore believes that it would be contrary to the principle of execution in good faith to interpret Article 99 (3) as an exceptional provision which must be interpreted in the most restrictive manner rather than as a transitional provision the aim of which is to confirm for the future an already vested right.

The applicant's view is that even in the absence of a transitional scheme of the kind envisaged by Article 99 (3), he would have preserved his right to an allowance equal to 4 times his final monthly salary; he has never waived, and cannot be deemed to have waived a promise made to him on the basis of a General Regulation of the Community.

According to the defendant the applicant can claim that the resettlement allowance which may eventually be paid to him should in no way be less than the amount which he would have received under Article 12 of the General Regulations of the Community (ECSC).

Article 12 fixes this allowance on the basis of 4 months' salary. The *amount* which would have been payable under Article 12 of the former General Regulations would not in any event have exceeded 4 months' salary, calculated on the basis of the salary scale in force only until 31 December 1961. The defendant interprets the scheme laid down by Article 99 (3) as follows:

Although as a general rule the resettlement allowance is equal to only two months' salary calculated according to the salary scale in force at the date of termination of service, nevertheless in a case where 4 months' salary calculated according to the former salary scale could, in respect of an employee employed by an institution of the ECSC before 1 January 1962 who left it after that date, amount to a higher allowance, *this latter amount* would be for this employee the minimum amount (and at the same time the maximum, in this case) of his entitlement, and this in derogation from the provisions of the new Staff Regulations — a derogation which is itself dictated by a desire to safeguard established rights.

In the opposite case, where two months' salary calculated on the basis of the present salary scale, would amount to more than 4 months' salary calculated on the basis of the salary scale in force on 31 December 1961, the general rule would apply and it would be the higher amount (2 months according to the present scale) which would have to be paid to the official.

In support of this interpretation the defendant refers to the fact that the actual wording of Article 99 (3) of the 1962 ECSC Regulations is limited to stating that the amount of the allowance due to an official affected by this provision cannot be less than the amount which would have been payable under the former Article 12.

If the intention of the draftsmen of the 1962 ECSC Staff Regulations had been that the allowance of four months' salary due to employees referred to in Article 99 (3) should be calculated on the basis of the new salary scale, there would have been no reason for them to have employed the phrase 'may not be less' which conjures up an idea of comparison and checking which necessarily has to be carried out.

This interpretation of Article 99 (3) has regard to:

— The desire shown by the draftsmen of the 1962 Regulations not to prejudice old employees through the amendment of the Regulations reducing by half the number of months taken into account in determining the resettlement allowance.

— The balance of the alteration of the salary scale and the stricter definition which they have given to the rules governing resettlement allowance.

— The reasonable concern not to grant old employees an additional advantage which would have arisen from the calculation of the allowance on the basis not only of the number of months formerly and still granted but in addition on the basis of the new salary scale.

— The principle illustrated by Article 102 (5) of the Regulations at present in force, which entails that rights acquired under the system of the former Regulations may not lead, by a combination of the old and new provisions, to the grant of excessive advantages, which could not arise either under the old system or under the current one.

Article 99 (3) of the ECSC Regulations, which is the only context in which the old Article 12 survives, is a provision concerning, not the conditions for entitlement to resettlement allowance, but the payment of the amount of this allowance. As regards the minimum distance from the place of his former employment at which the official must resettle to be able to claim the resettlement allowance, it is clear that this distance must be 70 km under Article 6 (4), Annex VII of the new Regulations and not 25 km under Article 12 (e) of the former General Regulations.

Under Article 6, Annex VII, which does not readopt the provisions of the former Article 12 (f) under which 'the declaration of resettlement must be notified in writing within one year of termination of service', this formality is no longer required of former ECSC officials, even those recruited before 1 January 1962.

In the case where the official dies the allowance may be paid to his widow or 'to the dependants within the meaning of Article 2' of Annex VII, whereas under the former Article 12 (c) the resettlement allowance was provided for the widow, or if there was none, 'to dependent children' only.

For these reasons the defendant considers that Article 6 of Annex VII of the present Regulations has complete authority as regards the conditions of entitlement to resettlement allowance. There is no provision in Article 99 (3) referring to the former Article 12 (f) and keeping it in force.

Since it is a question only of the payment of the allowance, the defendant considers that Article 99 (3) of the 1962 ECSC Regulations has introduced simply a relative and not an absolute derogation from the provisions of Article 6 of Annex VII to the present Regulations. If today there is still cause to refer to the former Article 12, having regard to Article 99 (3) of the 1962 ECSC Regulations, still in force, it is only insofar as Article 12 establishes the rules for paying the allowance. It is thus basically a question of Article 12 (a), which provides that the allowance is four months for an official who is head of household and two months for an

official who is not so. The former rule applies only insofar as it derogates from the present general rule.

Not having survived as such in the present rule, the former Article 12 (d) does not, properly speaking, establish vested rights in favour of former ECSC officials who took up duties before 1 January 1962 and who are currently leaving the service. At present they have the same right to have their allowance paid on the basis of the last salary which was paid to them; they have this right however not as vested right but solely under the wording of Article 6 (3) of Annex VII to the present Regulations which is included in a system under the Regulations which lays down differently the conditions of payment of the allowance.

The derogation in Article 6 (1) of Annex VII to the Regulations provided for in Article 99 (3) must in any case be interpreted strictly: it can only be limited to referring to the conditions of payment of the allowance such as they were in force before 1 January 1962. These were necessarily determined in relation to a particular salary scale.

The restrictive interpretation has the merit of doing the less violence to the principle of equality of treatment within the same body, which is a firm principle and applies strictly to an administration save express and unequivocal derogation.

In order that there should be a vested right on the basis of the former Regulations to pecuniary benefits arising from the termination of service, it is necessary for all the facts giving rise to the right to have occurred while the former rules were in force. The official cannot on principle be entitled at the time of his resettlement to have the amount of his benefit calculated solely on the basis of rules which were previously in force but which have ceased to be so.

According to the Commission, writers and national case law agree on this point, and as Mr Advocate-General Roemer has stressed in his Opinion in *Boursin v High Authority* (Case 102/63, Rec. 1964, p. 1394) it is right to refer to the national laws relating to public office and their principles for the solution of actual legal problems relating to the Staff Regulations of the Communities.

There is no entitlement to the benefits recognized by the Regulations except insofar as all the facts giving rise to the right occurred while the Regulations were in force. 'This argument ... is the logical consequence of the notion that the official is not in a contractual position but in one governed by Regulations, for the Staff Regulations are true Regulations which can always be amended by the competent authority' Mr Advocate-General Gand in *Pasetti v Commission* (Case 20/68, Rec. 1969, p. 251).

A transitional provision issued on transition to a less generous system does not normally aim to give employees more extensive rights than those they had under the system which is revoked: Mr Advocate-General Gand in *Chuffart and others v Commission* (Cases 60 and 62/69, Rec. 1970, p. 641).

If it were accepted Article 99 (3) allowed the grant of an allowance equal to four months' salary on the basis of the current salary scale, the result would be to 'give employees more extensive rights than those they had under the system which is revoked', which limited the allowance to four months' salary on the basis of the old salary scale.

There was no oral procedure since the parties declined to be heard orally.

The Advocate-General delivered his opinion on 4 July 1974.

Law

1 The appeal in Case 177/73 filed at the Registry on 26 October 1973 and the appeal in Case 5/74 filed on 30 January 1974 seek the annulment of the implied decision rejecting the complaint made by the applicant that his resettlement allowance should be equal to four times his last basic salary.

2 The applicant maintains that under Article 99 (3) of the Transitional and Final Provisions of the ECSC Staff Regulations which came into force on 1 January 1962, he has retained the benefit of the system of resettlement allowance originally provided for in Article 12 of the General Regulations of 1956 which determined the amount of this allowance.

3 He contends that new provisions thus applicable to staff who took up employment after the 1962 Regulations came into force and continued by the consolidated Staff Regulations of the European Communities, which reduce the amount of this allowance to twice the basic salary, do not apply to him.

Admissibility

4 In Case 177/73 the Commission has raised a defence of inadmissibility based on the premature nature of the appeal, taking into account the fact that at the time the appeal was filed there had as yet been no express or implied decision on the departmental complaint.

5 The second paragraph of Article 91 (2) of the Staff Regulations provides that an appeal shall lie only if the complaint has been rejected by express decision or by implied decision.

6 Article 91 (4) provides for a single derogation from paragraph 2 in the case of an appeal accompanied by an application for a stay of execution of the contested act.

7 Since this derogation does not apply to the present case Appeal 177/73 is inadmissible.

8 In an interlocutory application the Commission raised with regard to Appeal 5/74 a defence of inadmissibility based in the first place on the lack of interest on the part of the applicant in claiming payment of a resettlement allowance since the applicant was not as yet resettled.

9 In the second place, the letter from the Director of Personnel of 10 May 1973, which was limited to supplying the applicant with simple administrative information relating to the substance of a purely hypothetical decision, did not constitute an act adversely affecting him.

10 Under Article 6 (3) of Annex VII to the Staff Regulations the resettlement allowance is to be calculated by reference to the date of termination of service.

11 If the official may claim his rights only after his effective resettlement, he could be uncertain as to his financial position.

12 On application to terminate his service an official has in consequence an interest in requesting a definite decision as to the amount of the resettlement allowance.

13 Only those acts capable of directly affecting a precise legal position can be regarded as adversely affecting an official.

14 Before his application to leave the service was accepted, the applicant requested over the telephone an interpretation of the provisions in question.

15 By letter dated 30 March, which refers to this telephone conversation, the applicant, while mentioning his claim to a resettlement allowance equal to four times his basic salary, requested a 'more authoritative' interpretation of the said provisions.

16 This shows clearly that he wanted a definite decision on which proceedings, both administrative and contentious, could be based.

17 The applicant left the service on 1 May 1973 and the Director of Personnel replied on 10 May 1973 rejecting his claim.

18 The decision of the Director-General of 10 May 1973 was consequently aimed at determining the rights which the applicant had in a particular legal situation.

19 In these circumstances the decision contained in the letter of 10 May 1973 rejecting the applicant's claim of 30 March 1973 constituted an act adversely affecting him within the meaning of Article 90 (2) of the Staff Regulations.

20 The defence of inadmissibility made in Appeal 5/74 must therefore be rejected.

Substance

21 Article 99 (3) of the ECSC Staff Regulations, which comes under Title VIII concerned with transitional and final provisions, provides that the amount of the resettlement allowance due to established officials under the old ECSC Staff Regulations who terminate their service after the new Regulations come into force shall not be less than the amount which the persons concerned would have received under the provisions of Article 12 of the former ECSC General Regulations.

22 A transitional provision issued on the transition to a less generous system does not normally seek to give employees greater rights than they would have had under the system which is revoked.

23 Such a provision cannot therefore be interpreted as allowing a combination of the more favourable method of calculation of one system with the more favourable salary scale of another.

24 Article 99 (3), in providing expressly that the amount of the allowance paid to an official shall not be less than that which he would have received under Article 12 of the former Regulations, was intended to prevent an official who terminates his service after the new system has come into force from finding himself financially in a less favourable position than he would have had if he had left the service before the new system came into force.

25 Having regard to the new salary scales in force since 1 January 1962, when the amount of the allowance equal to two months' basic salary is less than the amount equal to four months' basic salary at the same grade calculated on the basis of the old salary scales, this provision enables the official concerned to enjoy the more favourable terms.

26 As soon as the new salary scales double the salaries prior to 1962, this safeguard clause is no longer applicable.

27 The appeal in Case 5/74 must therefore be rejected as unfounded.

Costs

28 The applicant has failed in his appeal.

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party must bear the costs.

30 Nevertheless, under Article 70 of the Rules of Procedure, in actions by staff of the Communities the institutions shall bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses appeal 177/73 as inadmissible;

2. Dismisses appeal 5/74 as unfounded;

3. Orders each party to bear its own costs.

Sørensen Kutscher Mackenzie Stuart

Delivered in open court in Luxembourg on 11 July 1974.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 4 JULY 1974 [1]

Mr President,
Members of the Court,

I — Facts

Messrs Reinarz and Becker (Joined Cases 177/73 and 5/74 and Case 10/74) are both former officials of the European Coal and Steel Comunity and took up their duties respectively in 1952 and 1953.

At first they came under the first Staff Regulations of this Community, which came into force in 1956, and subsequently they were brought under the Regulations issued by the Council in 1962 and regraded, the former in Grade A 2 and the latter in Grade A 4.

They continued to perform their duties in 1968, but with the single Commission in Brussels.

In consequence of the accession of new Member States the Council introduced, by Regulation No 2530/72 of 4 December 1972, special measures for the termination of service of officials, on the one hand to permit the recruitment of nationals of these new Member States and on the other hand at the same time to facilitate the departure, before retirement, of officials in Grades A 1 to A 5 on undoubtedly favourable terms.

1 — Translated from the French.