JUDGMENT OF THE COURT (Third Chamber)
12 June 1986 *

In Case 229/84

Maria Sommerlatte, a retired official of the Commission of the European Communities, residing at Eurotel, 2 Todtmoserstraße, D-7822 St Blasien, assisted and represented by Victor Biel, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18 A rue des Glacis,

applicant,

v

Commission of the European Communities, represented by its Principal Legal Adviser, Henri Etienne, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for compensation on the basis of the Commission's liability for failing to inform its retired officials in good time of certain amendments to the German legislation on sickness insurance schemes,

THE COURT (Third Chamber)

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

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 11 December 1985,

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 an application lodged at the Court Registry on 12 September 1984, Maria Sommerlatte, a retired official of the Commission of the European Communities, brought an action for damages for the Commission's failure to fulfil its duty to provide assistance to her.

2 It appears from the documents before the Court that the applicant, who is paid a Community pension, is also a member of the German sickness insurance scheme of the Barmer Ersatzkasse (hereinafter referred to as 'the German fund'). Until the end of 1982 her contributions to the German fund were calculated on the basis of her German pension rights without the income from her Community pension being taken into account.

3 The Gesetz über die Anpassung der Renten der gesetzlichen Rentenversicherung im Jahr 1982 [Law on the adjustment of statutory pensions for 1982] of 4 December 1981 amended Paragraph 180 of the Reichsversicherungsordnung [Law on sickness insurance] in such a way that from 1 January 1983 the calculation of the applicant's contributions to the German scheme had also to take into account her income from her Community pension. However, under Paragraph 23 of the Law of 4 December 1981, amending Paragraph 534 of the Reichsversicherungsordnung, the applicant, who had until then been compulsorily subject to the national insurance scheme, could apply for disaffiliation from the German fund on production of evidence of her membership of another sickness insurance fund, provided that such application was made by 31 March 1983 at the latest.

4 Informed of the problems posed by the new German legislation, the Commission, in reliance on the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities, according to which the salaries and wages paid by the Communities are exempt from national taxes, sent identical letters dated 17 November 1982 to the seven Community pensioners who had raised the matter with it advising them not to declare the amount of their Community pension to the German sickness insurance funds. The applicant was

the only pensioner affected by the change who had not notified the Commission of her interest in the matter. However, after the German authorities had cited the Court's judgment of 25 February 1969 (Case 23/68 *Klomp* v *Inspektie der Belastingen* [1969] ECR 43) in support of their opposite view the Commission sent identical letters dated 16 March 1983 to the pensioners who had contacted it and drew their attention to the consequences of their failure to declare the amount of their Community pension to the German authorities and to the possibility of disaffiliation from the German scheme before 31 March 1983. It annexed to the letters a certificate attesting the pensioners' affiliation to the Community sickness insurance scheme. For the benefit of the persons affected, the Commission also published in the Staff Courrier of 28 March 1983 a reference to the possibility of applying before 31 March 1983 for disaffiliation from the German fund.

5 The applicant, who had disclosed the amount of her Community pension to the German fund, received a letter from it dated 2 March 1983 fixing the amount of her monthly contribution to the German scheme, calculated on the basis of her Community pension, at DM 140.19, that is to say 6.05% of that pension. She replied on 4 March 1983 enquiring as to any statutory possibility of exemption from that contribution. By a letter dated 18 March 1983 the German fund informed her of the possibility of disaffiliation from the national scheme before the time-limit of 31 March 1983. The applicant states that she did not receive that letter.

6 Since the applicant did not apply for disaffiliation from the German scheme until 29 November 1983, her application was rejected on 15 December 1983 on the ground that it was made out of time.

7 Meanwhile, on 27 August 1983, the applicant had applied to the Commission under Article 90 of the Staff Regulations of Officials for an increase in her Community pension to the extent to which her pension was reduced by the monthly contribution to the German sickness insurance scheme.

8 That application was rejected on 6 October 1983 on the ground that pension rights were fixed by the Staff Regulations and that it was therefore impossible to change them to take account of other factors.

9 On 24 December 1983 the applicant submitted a complaint to the Commission pursuant to Article 90 (2) of the Staff Regulations. That complaint was rejected first by an implied decision and then by an express decision of 18 July 1984 before the expiry of the period for lodging an appeal provided for by Article 91 (3) of the Staff Regulations, whereupon the applicant brought this action on 12 September 1984.

10 The applicant maintains that she has suffered damage as a result of the Commission's maladministration inasmuch as it misled her by first stating that the new German legislation was incompatible with Community law and then changing its mind without informing her. She also complains that by not publishing the information in the Staff Courrier until 28 March 1983 the Commission failed to inform the pensioners concerned in good time of the option of disaffiliation from the German scheme, that it issued the certificate attesting the applicant's affiliation to the Community scheme, for use in disaffiliating from the German fund, more than four months too late, and that it failed to bring an action against the Federal Republic of Germany under the second paragraph of Article 169 of the EEC Treaty on the ground that the new German legislation concerning sickness insurance infringed the principles and provisions of Community law.

11 The applicant submits that the Commission has failed in its duty to assist its officials laid down in Article 24 of the Staff Regulations and that its conduct is contrary to the principle of the protection of legitimate expectations and the principles of good administration and therefore amounts to a wrongful act on the part of the Commission as a result of which the applicant has suffered damage.

12 The applicant considers that the damage of which she complains amounts to 6.05% of her present and future pension and seeks damages in the form not of a lump sum but of a monthly payment compensating for the loss suffered. She states that the sum is not to be regarded as an increase in her pension to be paid by the pension fund but as compensation to be paid from the Commission's budget.

13 The Commission maintains that the argument that it should have instituted proceedings against the Federal Republic of Germany before the Court under the second paragraph of Article 169 of the EEC Treaty is neither admissible nor well founded. Furthermore, an action brought under Article 179 of the EEC Treaty

cannot be used as an indirect means of ascertaining whether the German legislation concerning sickness insurance and the obligation of Community pensioners to pay contributions to the German scheme calculated on the basis of the amount of their pensions are contrary to Community law.

14 According to the Commission this action must therefore be limited to the question whether the Commission, as the appointing authority, failed in its duty to provide assistance to the applicant.

15 In that connection the Commission emphasizes that it acted in good time to inform the Community pensioners who had raised the matter with it of the possibility of disaffiliating from the German sickness insurance scheme and had annexed to the letters sent to them the necessary certificate of affiliation to the Community sickness insurance scheme, and that the applicant had knowledge of one of those letters since she had annexed it to her complaint dated 24 December 1983.

16 The Commission observes that although the principle underlying Article 24 of the Staff Regulations is that the Commission is under an obligation to provide assistance when an official has need of such assistance for his protection, the applicant did not in fact have need of that assistance in so far as she was aware of the possibility of disaffiliation from the German insurance scheme from the German fund's enquiry as to the amount of her Community pension and from her subsequent correspondence with the German fund which resulted in the letter of 18 March 1983 which the German fund states it sent to the applicant.

17 The Commission further states that if the applicant had submitted her application for disaffiliation from the German scheme on the date that she admits to knowing of that possibility, that is to say, on 5 or 6 April 1983, the German authorities would not have refused the application on the ground that it was out of time since they had extended the time-limit in another case. It adds that the applicant has never applied to it for a certificate of affiliation to the Community scheme which she had no intention, in fact, of using since her objective was to avoid payment of the contribution based on her Community pension and not to disaffiliate from the German scheme, as is clear from her correspondence with the German fund.

18 Finally, the Commission maintains that the change in its initial position concerning the compatibility of the German legislation with Community law did not prejudice the pensioners affected who had informed it of their interest in the matter or who had acted on the advice given by it in the Staff Courrier of 28 March 1983.

19 It must be pointed out that, although the wording of Article 24 of the Staff Regulations appears to impose on the Community institutions an obligation to provide assistance only for officials and other servants who are in post, the provision, nevertheless, has a more general scope: its purpose is to provide officials and other servants in active employment with protection both at the present time and in the future in order to enable them to carry out their duties better in the general interest of the service. Consequently, the Community institutions' duty to provide assistance also extends to retired staff.

20 In principle, it is for the person concerned to request assistance from the relevant institution. However, exceptional circumstances may oblige the Community institution to provide specific assistance not in response to a request from the individual concerned but on its own initiative.

21 That is precisely the position in this case. It is clear from the documents before the Court that the Commission originally considered that the new German legislation was incompatible with the provisions of Community law and advised the Community pensioners who had notified it of their interest in the matter not to declare the amount of their pensions to the national authorities. However, after discussions with the German authorities the Commission, by a standard letter dated 16 March 1983, advised those pensioners to disaffiliate from the German scheme and to that end sent them a certificate of affiliation to the Community scheme.

22 It is also evident that the number of Community pensioners affected by the new German legislation is very limited; according to the Commission only eight persons were involved and, with the exception of the applicant, they all notified the Commission of their interest in the matter and were individually informed by it. Even though the applicant failed to notify it of her position, the Commission was aware of her affiliation to the German fund. It should therefore have informed her personally in the same way as it had informed the others.

23 It must also be pointed out that the information which the applicant received by means of the Commission's communication in the 28 March 1983 issue of the Staff Courrier was too late to enable her to effect her disaffiliation from the national scheme before 31 March 1983.

24 It follows from the foregoing that the Commission failed to inform the applicant in good time of its actual opinion as regards the compatibility of the German legislation with Community law and the possibility of disaffiliation from the German fund before 31 March 1983.

25 That failure on the part of the Commission was one reason for the applicant's continued affiliation to the German sickness insurance scheme.

26 However, the Commission's failure was not the sole reason for her continued affiliation to that scheme. The applicant failed to inform the Commission of her situation either at the outset, as the other pensioners involved had done, or after she had received the German fund's letter dated 2 March 1983 informing her of the amount of her monthly contribution based on the amount of her Community pension. In addition, she has not shown that she made the requisite efforts to find out from the German fund whether or not it was possible to disaffiliate from the German scheme.

27 It follows that the damage caused to the applicant by her continued affiliation to the German scheme and the obligation to make contributions to it calculated on the basis of her Community pension is the result both of the Commission's actions and the applicant's own conduct.

28 It must also be pointed out that continued affiliation to the German fund entails certain advantages for the applicant in the form of the benefits to which she is entitled from it and that those advantages must be taken into account in determining the damage suffered by her.

29 In view of the foregoing the Commission must be ordered to pay to the applicant each month a sum equivalent to 50% of the contribution, calculated on the basis of her Community pension, which she is required to pay each month to the German fund.

Costs

30 Under Article 70 of the Rules of Procedure, the institutions are to bear their own costs in proceedings brought by servants of the Communities. Consequently, the Commission must be ordered to pay its own costs.

31 Under the first subparagraph of Article 69 (3), the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads. In this case, as the Commission has failed in some of its submissions, it must be ordered to pay one half of the applicant's costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Orders the Commission to pay to the applicant each month a sum equivalent to 50% of the contribution, calculated on the basis of her Community pension, which she is required to pay each month to the Barmer Ersatzkasse.

(2) Orders the Commission to pay one half of the applicant's costs in addition to its own costs.

Everling Galmot Kakouris

Delivered in open court in Luxembourg on 12 June 1986.

P. Heim
Registrar

U. Everling
President of the Third Chamber