JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 16 JULY 1981 [1]

Gordon Craigie Bowden and Others v Commission of the European Communities

"Officials — Rates of exchange for the calculation of pensions"

Case 153/79

Officials — Applications to the Court — Application directed against a regulation — Absence of act adversely affecting the official — Inadmissibility

(EEC Treaty, Art. 173; Staff Regulations of Officials, Arts 90 and 91; Council Regulations Nos 3085 and 3086/78 amending the Staff Regulations of Officials)

Regulations Nos 3085 and 3086/78 are of general application and hence officials may not claim that they constitute decisions which are of direct and individual concern to them in order to call their validity in question in proceedings under Article 173 of the Treaty.

The mere submission of a complaint pursuant to Article 90 of the Staff Regulations is not sufficient to create a judicial remedy against a measure which is in the nature of a regulation. The procedure provided for in Article 90 (2) applies only where the appointing authority has taken a decision or has refrained from adopting a measure prescribed by the Staff Regulations and where such conduct constitutes an act adversely affecting the official.

In Case 153/79

GORDON CRAIGIE BOWDEN AND OTHERS, officials of the Commission of the European Communities, represented by Francis Jacobs of the Middle Temple, Barrister, with an address for service in Luxembourg at the residence of G. W. Clarke, 3 Rue Dante,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Thomas F. Cusack, acting as Agent, with an address for service in

1 — Language of the Case: English.

Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the defendant's decision rejecting the applicants' complaints pursuant to Article 90 (2) of the Staff Regulations concerning the application to them of Council Regulations (Euratom, ECSC, EEC) Nos 3085/78 and 3086/78 of 21 December 1978,

THE COURT (First Chamber),

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

Under the Staff Regulations (Article 82 (1) and Annex VIII, Article 45 (3)) beneficiaries are entitled to have their pensions paid in Belgian francs adjusted by a weighting which varies according to the country of residence of the pensioner. Article 5 (2) of Council Regulation (Euratom, ECSC, EEC) Nos 3084/78 (Official Journal 1978, L 369, p. 1) fixed the weighting for the United Kingdom at 144.1%. A pensioner residing in the United Kingdom with a pension entitlement of A received A × 1.441 Belgian francs. Converted

into pounds sterling, at the prevailing rate of exchange this gave a pension (P) of

$$\frac{A \times 1.441}{60} \text{ pounds sterling.}$$

If, on the other hand the pensioner decided to have his pension paid in sterling, it would be converted into sterling in accordance with Article 63 (3) of the Staff Regulations "on the basis of the par accepted by the International Monetary Fund and in force on 1 January 1965, that is at the rate of 140 Belgian francs to the pound", giving the pensioner a pension of

$$\frac{A \times 1.441}{140} \text{ pounds sterling.}$$

Therefore as a result of the failure of the Community authorities to take into account changes in the exchange rate of the currencies of Member States, a person resident in the United Kingdom who elected to have his pension paid in Belgian francs obtained a substantially higher pension than the beneficiary who chose to have his pension paid in sterling.

In order to rectify this anomaly the Council, in December 1978, adopted Regulations Nos 3085 and 3086/78 (Official Journal 1978, L 369, pp. 6 and 8) which amended the Staff Regulations relating to the calculation of pensions.

Article 1 of Regulation No 3085/78 reads:

"Article 63 of the Staff Regulations is replaced by the following:

Article 63

Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these Articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the varation in the Belgian franc with respect to the rates referred to in the second paragraph".

Regulation No 3086/78 adjusted the weightings applicable to the remuneration and pensions of officials of the European Communities. Article 1 (2) provides:

"With effect from 1 April 1979 the weightings applicable to pensions in accordance with the second paragraph of Article 82 (1) of the Staff Regulations shall be that given below for the Community country which the persons entitled to the pension declare their home to be:

...

United Kingdom: 62.5

..."

The applicants allege that the combined effect of these regulations is to reduce by more than 50% the pension of a beneficiary resident in the United Kingdom who has elected to have his pension paid in Belgian francs. As from 1 April 1979 the pension was calculated as $P = A \times 0.625$ Belgian francs instead of $P = A \times 1.441$ Belgian francs.

On 26 October 1979 the defendant raised a preliminary objection of inadmissibility under Article 51 of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber), decided to open the oral procedure on the preliminary objection, without any preparatory inquiry.

II — Conclusions of the parties

The *applicants* claim that the Court should:

(1) Declare Regulations Nos 3085 and 3086/78 inapplicable;

(2) Annul the defendant's decision rejecting the applicants' complaints concerning the application to them of those regulations;

(3) Order the defendant to pay costs.

The *Commission* contends that the Court should:

(1) Dismiss the application as inadmissible;

(2) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicants* submit that Regulations Nos 3085 and 3086/78 are illegal. They were, it is alleged, adopted in violation of essential procedural requirements.

The Council failed to consult the European Parliament as required by the Treaty (Merger Treaty, Article 24 (1)). Regulation No 3085/78 refers in its preamble to the opinion of the Parliament published in Official Journal 1977, C 183. However, that opinion was concerned with a proposal of the Commission of 2 March 1977 (Official Journal 1977, C 99) on the introduction of the European unit of account into the Staff Regulations. Since Regulation No 3085/78 has nothing to do with the European unit of account, it can be concluded that there was no proper consultation of Parliament.

Indeed the Parliament in its resolution notes "the Commission's assurance that its proposal will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances".

The applicants point out that the absence of proper consultation with the Parliament on Regulations Nos 3085 and 3086/78 is confirmed by the fact that it was not until after their adoption that there was any awareness of their effect on existing rights.

The preamble to Regulation No 3085/78 refers to the opinion of the Court of Justice. The applicants, in the absence of any knowledge of any consultation with the Court of Justice, assume that this opinion, like that of the Parliament, was given on the Commission's proposal to introduce the European unit of account into the Staff Regulations. The applicants conclude that the procedure

for consultation required by Article 24 (1) of the Merger Treaty has not been followed and this renders Regulations Nos 3085 and 3086/78 illegal.

The applicants argue that the above-mentioned regulations offend against Article 190 of the Treaty in so far as they do not state the reasons on which they are based.

The applicants further submit that Regulations Nos 3085 and 3086/78 constitute a *violation of vested rights.* They point out that it is well established in the case-law of the Court that the Council has no power to amend the Staff Regulations in violation of vested or acquired rights (droits acquis). The terms of Annex VIII to the Staff Regulations recognize that since pension rights accrue by virtue of years of pensionable service they vest not only in those already retired and already receiving a pension, but in anyone who has completed a period of service qualifying for a pension. Moreover many officials, in pursuance of Article 11 (2) of Annex VIII, upon entry into the service of the Commission, transferred the actuarial equivalent of retirement pension rights acquired in the expectation that they would benefit from the provisions in force at the time they made the transfer.

The applicants argue that it is a fundamental principle of law that legislation may not deprive an individual retroactively of vested rights. Legislation which operates retrospectively in such a way as to deprive either pensioners or those in service of pension entitlements, violates this general principle of law and is contrary to the practice of Member States in the matter of public service pension schemes.

Consequently vested rights which have accrued in respect of periods of service completed, and rights transferred to the Community pension scheme, must be governed by the provisions in force at the time when those rights accrued.

The applicants draw a distinction between variable factors in pension formulae such as weightings for the cost of living, and provisions which define these factors. The former can be varied, the latter cannot since any change necessarily affects the basis for the determination of pension rights.

The *defendant* raises a preliminary objection as to the admissibility of the application and requests the Court, pursuant to Article 91 of the Rules of Procedure, not to enter into the merits of the case but to rule on this objection.

The defendant submits that the application is inadmissible on two grounds:

"That neither under the procedure governed by Article 179 of the EEC Treaty and Articles 90 and 91 of the Staff Regulations nor under that governed by Article 173 of the EEC Treaty is it open to Community officials to attack directly a regulation of the Council;

That the applicants have no *locus standi,* that is, no legitimate interest in criticizing Regulations Nos 3085/78 and 3086/78."

The defendant argues that it is not possible to attack a Council regulation under Article 184 except in the course of proceedings in which that regulation is in issue (Joined Cases 31 and 33/62 *Milchwerke Heinz Wöhrmann* v *Commission* [1962] ECR 501).

Consequently, for the purpose of the present proceedings, Regulations Nos 3085 and 3086/78 cannot be attacked unless the application is admissible under Article 179 or Article 173.

The defendant submits that the application is not admissible under either of these provisions.

Article 179 gives the Court jurisdiction in any dispute between the Community and its officials within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.

Article 91 provides:

"The Court of Justice of the European Communities shall have jurisdiction in any dispute between the Communities and any person to whom these Staff Regulations apply regarding the legality of an act adversely affecting such person within the meaning of Article 90 (2) . . ."

Article 90 (2) defines acts as decisions taken by the appointing authority, in this case the defendant, or the failure by the same authority to adopt measures prescribed by the Staff Regulations.

The Court in Case 48/79 *Ooms* v *Commission* ([1979] ECR 3121) which concerned an attack on Regulations Nos 3085 and 3086/78, held that they did not constitute acts within the meaning of Article 91 (2), consequently the Court had no jurisdiction under Article 179.

The defendant concludes that, in the light of the Court's decision in *Ooms*, the present application is inadmissible under Article 179 of the Treaty. The applicants have lodged complaints under Article 90 (2) before bringing their appeals to the Court but this cannot give the Court jurisdiction since the substance of the complaints, the annulment of Regulations Nos 3085 and 3086/78, is beyond the Court's jurisdiction.

The defendant submits that the application is also inadmissible under Article 173. Article 173 states:

"The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceeding provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

Although the regulations in question are "acts of the Council" the legality of which may be reviewed under Article 173 (1), they cannot be said to be decisions which, although in the form of regulations, are of direct and individual

concern to the applicants since they apply to all Community officials (Case 48/79 *Ooms).*

Furthermore, the defendants point out, the "acts" in question have not been attacked within the two month time-limit provided for in the third paragraph of Article 173.

The defendant argues that the applicants have no immediate and vested interest in the substance of their complaint and therefore have no *locus standi.* The applicants have not completed ten years of service. They have only an expectation that some day they will begin to acquire potential rights. Yet they seek judgment upon the method whereby their pension entitlement, expressed in Belgian francs, will be converted into the currency of their country of retirement. Given these circumstances the applicants cannot be deemed to have a certain and immediate interest in the issues before the Court.

The defendant, although reserving argument on the merits of the case, makes the following observations on the applicants' statement of facts.

The Council, in Regulations Nos 3085 and 3086/78 did not reduce pensions. It merely put an end to an anomaly whereby, as a result of currency fluctuations from 1971 onwards, pensioners resident in weak currency countries who chose to have their pensions paid in Belgian francs obtained unjustifiable financial advantages.

Regulations Nos 3085 and 3086/78 have not altered the amount of pensions payable to retired officials.

Prior to the adoption of Regulations Nos 3085 and 3086/78 a pensioner resident in the United Kingdom who opted for the payment of his pension in sterling received

$$P = \frac{A \times 1.441}{140} \text{ pounds sterling.}$$

Today his pension would be

$$P = \frac{A \times 0.625}{60.75} \text{ pounds sterling.}$$

This position therefore is unchanged since the application to him of the regulations in question.

The *applicants* in their reply to the Commission's objection as to admissibility question the Commission's assertion that the Council has not reduced pensions when in fact the effect of the offending regulations is to reduce pensions by more than 50%.

The applicants point out that they are not seeking "to attack directly a regulation of the Council"; their application is for the annulment of a decision of the defendant.

Case 48/79 *Ooms* v *Commission* is therefore not in point. The issue in these proceedings is whether an applicant can challenge a decision rejecting his complaint concerning the effect on him of a regulation.

The Court has in the past been prepared to examine the legality of a regulation provided a complaint has first been made to the employing institution and the action before the Court is directed against the complaint (Case 28/74 *Gillet* v *Commission* [1975] ECR 463, Case 48/76 *Reinarz* v *Commission and Council*

[1977] ECR 291). The terms of Article 90 (2) make it clear that such an action is admissible, even where the complaint is made against an act of general application. Moreover, provisions regarding the right of interested parties to bring an action must not be interpreted strictly; if the law is silent, a restriction must not be implied (Case 26/62 *Plaumann* v *Commission* [1963] ECR 95).

The applicants point out that if this action is inadmissible, a manifestly illegal regulation could never be challenged (except at the suit of a Member State or of the Council or Commission). This would be particularly serious from the point of view of the Staff Regulations, since officials adversely affected by illegal regulations have no alternative remedy.

The applicants reject the defendant's argument that the action is inadmissible because the acts being challenged are of general application. They argue that although the acts may be of general application, they affect the applicants differently from the way in which they affect other Community officials.

The applicants conclude that a regulation in staff matters must be open to direct challenge by way of action against the rejection of a complaint or at the very least where either the regulation is manifestly illegal or where the regulation affects some officials differently and adversely or where the regulation has retroactive effects. Applying these criteria the application is admissible. Alternatively, the applicants contend that the issue of admissibility should be reserved until the substance of the case has been heard.

The applicants reject the Commission's submissions that they have no certain and immediate interest in the subject-matter of the application. The applicants point out that they are not raising the issue of how their pension entitlement will be changed into some other currency; their application concerns weightings which, in the case of the United Kingdom, have been reduced by Regulations Nos 3085/78 and 3086/78 by more than 50%.

Even if the Court considers that no pension rights are vested until the period of ten years is completed or until the moment of retirement, the regulations in question immediately and directly affect the legal situation of the applicants. The Court in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189 stated:

"Although it is true that before retirement, an uncertain future event, pension rights are contingent rights which are in process of creation from day to day, it is none the less clear that an administrative act which decides that a particular period of employment cannot be taken into account for the calculation of years of pensionable service immediately and directly affects the legal situation of the person concerned even if that act is to be implemented only subsequently."

The applicants submit that similar considerations, *mutatis mutandis*, apply in the present case. The very basis and function of the weightings applicable to pensions have been unlawfully changed; they have been changed with retroactive effect in so far as they affect periods of

service already completed and equivalent service credited by transfers from other pension schemes. As a result the applicants can predict the effect of the regulations on their pension rights which is to reduce the value of their rights by more than 50%. It is true that the option to receive their pension in Belgian francs is an option that the applicants can exercise only in the future, as indeed is the decision to retire to the United Kingdom, but it cannot be denied that the offending regulations deprive them now of the benefit of that option.

The applicants submit that they have a sufficient interest in the merits of the case and that the Commission's objection as to admissibility should be rejected. Alternatively, since the Commission's objection as to admissibility raises the question whether the applicants have a sufficient interest in the substance of their complaint, that question concerns the merits and should be reserved until the substance of the case is heard.

IV — Oral procedure

The parties presented oral argument at the sittings on 19 and 20 February 1981.

The Advocate General delivered his opinion at the sitting on 14 May 1981.

Decision

1 By application lodged at the Court Registry on 2 October 1979 the applicants, 12 officials of the Commission, brought an action against the Commission pursuant to Article 91 of the Staff Regulations of Officials claiming that the Court should:

(1) Declare Council Regulations Nos 3085/78 and 3086/78 inapplicable as regards them;

(2) Annul the Commission decision rejecting the applicants' complaints concerning the application to them of those regulations.

2 In the version in force until the end of 1978, Articles 63 and 64 of the Staff Regulations of Officials provided that:

"An official's remuneration shall be expressed in Belgian francs.

It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund . . . on 1 January 1965.

An official's remuneration expressed in Belgian francs shall . . . be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment.

The weighting applicable to the remuneration of officials employed at the provisional seats of the Communities shall be equal to 100% as at 1 January 1962."

3 Article 82 of the Staff Regulations provides that:

"The pensions (of former officials) shall be calculated by reference to salary scales in force on the first day of the month in which entitlement commences.

They shall be weighted in the manner provided for in Article 64 and Article 65 (2) for the country of the Communities where the person entitled to the pension declares his home to be."

4 The third paragraph of Article 45 of Annex VIII (Pension scheme) provides that:

"Beneficiaries may elect to have their pensions paid in the currency either of their country of origin or of their country of residence or of the country where the institution to which the official belonged has its seat: their choice shall remain operative for at least two years."

5 On 21 December 1978 the Council adopted Regulation (Euratom, ECSC, EEC) No 3085/78 (Official Journal 1978, L 369, p. 6), Article 1 of which states that Article 63 of the Staff Regulations is replaced by the following:

"Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these Articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph."

6 According to the provisions of Article 4 of the regulation it was to enter into force on 1 January 1979 and was to apply from 1 April 1979. However, for pensions and allowances of which the net amount became less than that under the existing arrangements, the regulation was only to apply from 1 October 1979. From that date the difference between the net amounts resulting from the implementation of that regulation and those received in September 1979 was to be reduced by $^1/_{10}$ per month.

7 On 21 December 1978 the Council also adopted Regulation (Euratom, ECSC, EEC) No 3086/78 adjusting the weightings applicable to the remuneration and pensions of officials and other servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations. Article 1 (2) of the regulation fixes *inter alia* the weighting applicable to pensions in accordance with the second subparagraph of Article 82 (1) of the Staff Regulations at 62.5 for the United Kingdom.

8 By various complaints under Article 90 (2) of the Staff Regulations of Officials the applicants (all save one) asked the Commission to take a decision in respect of them acknowledging that they would be entitled, upon the severance of the service relationship and subject to the fulfilment of all other conditions of the Staff Regulations, to a pension of the same amount as they would have received if Regulation No 3086/78 had not been adopted.

9 By a circular letter of 12 July 1979 the Commission rejected these complaints.

10 The applicants commenced this action following the rejection of their complaints. They contest Regulations Nos 3085/78 and 3086/78. They claim that Regulation No 3085/78 was adopted by the Council without due

consultation with the European Parliament and the Court of Justice. In addition the statement of the reasons on which the contested regulations are based is inadequate. The regulations were adopted in breach of the vested rights of the applicants to a pension calculated on the basis existing before the adoption of the said regulations.

11 By a document lodged with the Court Registry on 26 October 1979 the Commission, in pursuance of Article 91 of the Rules of Procedure of the Court, put forward an objection of inadmissibility. In its view the applicants are not entitled to contest directly a regulation of the Council either by the procedure of Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations of Officials or by that of Article 173 of the Treaty. Since the regulations in question are of general application the applicants cannot claim that they are of direct and individual concern to them. Consequently they cannot contest them under Article 173 of the Treaty. The mere submission of a complaint pursuant to Article 90 of the Staff Regulations and its rejection are not sufficient to create a judicial remedy against a measure which is in the nature of a regulation. Moreover the applicants, in their capacity as officials in service, have no interest capable of justifying their action. The circular letter of 12 July 1979 does not constitute a decision having a direct incidence on a given legal situation and thus an act adversely affecting them within the meaning of Article 90 of the Staff Regulations.

12 The applicants, in their observations on the objection, reply that they are not seeking to contest directly a Council regulation. Their action is directed against a decision of the Commission. It is legitimate for them to seek a declaration that the regulations are unlawful in so far as they illegally affect their pension rights. The applicants are entitled to contest a decision rejecting their complaint as to the effect upon them of a regulation. The regulations in question are discriminatory as against the applicants and affect their rights and they are of direct and individual concern to them. As regards their interest in taking action, the applicants acknowledge that at the time when the application was lodged they had no right to a pension but they maintain that the effect of the regulations in question is to affect at the present time the calculation of their future rights which, in their view, justifies their interest in taking action.

13 The Commission's objection must be upheld. The regulations in question are of general application and the applicants may not claim that they constitute

decisions which are of direct and individual concern to them in order to call their validity in question in proceedings under Article 173 of the Treaty. The mere submission of a complaint pursuant to Article 90 of the Staff Regulations of Officials is not sufficient to create a judicial remedy against a measure which is in the nature of a regulation. Moreover, the procedure provided for in Article 90 (2) applies only where the appointing authority has taken a decision or has refrained from adopting a measure prescribed by the Staff Regulations and where such conduct by the appointing authority constitutes an act adversely affecting the official. That has not occurred in the present case. Consequently it was not possible for the applicants' complaints to be based on Article 90 (2) of the Staff Regulations. The action is therefore inadmissible and must be dismissed.

Costs

14 Under Article 70 of the Rules of Procedure institutions are to bear their own costs in staff cases.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the parties to bear their own costs.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 July 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber