ORDER OF THE COURT,

24 January 1994 *

In Case C-275/93 P,

Michael Boessen, a former official of the Economic and Social Committee, residing at Lanaken (Belgium), represented by C. Paulussen, of the Maastricht Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 8 Rue Zithe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities of 11 March 1993 in Case T-87/91 between Michael Boessen and the Economic and Social Committee, seeking to have that judgment set aside and to have annulled the decision of the Economic and Social Committee of 5 September 1991 rejecting the appellant's complaint against the refusal to grant him an invalidity pension in the amount of 135% of the minimum subsistence figure,

the other party to the proceedings being:

Economic and Social Committee of the European Communities, represented by M. Bermejo Garde, legal adviser, acting as Agent, assisted by D. Lagasse and

* Language of the case: Dutch.

G. Tassin, of the Brussels Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

THE COURT,,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida, M. Díez de Velasco and D.A.O. Edward (Presidents of Chambers), R. Joliet, F.A. Schockweiler, G.C. Rodríguez Iglesias, F.Grévisse, M. Zuleeg and P.J.G. Kapteyn, Judges,

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 12 May 1993, Mr Boessen, a former official of the Economic and Social Committee of the European Communities ('ESC'), brought an appeal against the judgment of the Court of First Instance of 11 March 1993 in Case T-87/91 *Boessen* v *ESC* [1993] ECR II-235, in so far as the Court of First Instance declared inadmissible and manifestly unfounded the applicant's claim for annulment of the decision of 5 September 1991 by which the ESC had rejected his complaint against the refusal to grant him an invalidity pension in the amount of 135% of the minimum subsistence figure.

2 It appears from the contested judgment (paragraphs 1 to 11) that Mr Boessen was an official at the ESC from 1 December 1971 to 31 January 1981 and that, from 1 February 1981, he received an invalidity pension the amount of which was fixed at 120% of the minimum subsistence figure pursuant to the fifth paragraph of Article 78 of the Staff Regulations of Officials of the European Communities ('Staff Regulations'). The details of the calculation of that pension were notified to the official by Decision No 157/81A of the ESC of 20 January 1981 ('Decision 157/81A').

3 That decision was later modified by several decisions, first, in order to adjust the amount of the pension to changes in salaries and, secondly, upon the granting of various allowances.

4 On 13 February 1991 Mr Boessen submitted a request to the ESC to recalculate the invalidity pension and increase it to 135% of the minimum subsistence figure in accordance with the fourth paragraph of Article 77 of the Staff Regulations.

5 The ESC rejected that request by decision of 27 February 1991, and subsequently the complaint submitted against that decision, by decision of 5 September 1991. Mr Boessen brought an action before the Court of First Instance on 2 December 1991.

6 In his originating application, Mr Boessen claimed that the Court of First Instance should annul the decision of the ESC of 5 September 1991 and order that institution to recalculate his invalidity pension in order to bring the amount to 135% of the minium subsistence figure. In his reply lodged at the Court of First Instance, the applicant stated that the recalculation of his pension should have retroactive effect as from 1 February 1981 and that the amount of the pension should be increased by interest at a rate to be prescribed by the Court of First Instance. Furthermore, he stated that, should his claim for annulment be dismissed as inadmissible, his application should be interpreted as seeking that the ESC be ordered to pay him compensation equal to the amount of pension to which he would have been entitled by virtue of his recalculated pension as from 1 February 1981, with interest at a rate to be laid down by the Court of First Instance.

7 The Court of First Instance first of all rejected the claims for annulment submitted by Mr Boessen on account of their inadmissibility (paragraphs 25 to 35 of the contested judgment).

8 It pointed out first that, according to the case-law of the Court of Justice (Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709), an official, in availing himself of the provisions of the first paragraph of Article 41 of Annex VIII to the Staff Regulations in order to have his pension recalculated where there has been error or omission of any kind, must submit a complaint and, if necessary, bring legal proceedings within the periods laid down by Articles 90 and 91 of the Staff Regulations, starting from the time of the occurrence of a new fact such as to justify a recalculation of the pension or from the time when he actually became aware of the existence of such a fact. Secondly, it held that Decision 157/81A, which clearly stated the method and provisions of the Staff Regulations according to which the rate of Mr Boessen's pension had been established and which had not been challenged or subsequently amended on that point, should be considered to be the measure which set time running for the applicant to bring proceedings, even though the ESC had not expressly refused, by that decision, to apply the provisions of the fourth paragraph of Article 77 of the Staff Regulations. Thirdly, it considered that the interpretation of Articles 77 and 78 of the Staff Regulations on which the applicant relied for the first time in 1991 did not constitute a new fact which would cause time to start running afresh and that the applicant had not adduced any evidence such as to justify that his state of health had prevented him from bringing proceedings within the period provided for in the Staff Regulations.

9 The Court of First Instance then dismissed the claims for compensation submitted by the applicant as inadmissible (paragraphs 36 and 37 of the contested judgment).

10 It pointed out, first, that those claims had not been preceded either by a request or a complaint, within the meaning of the Staff Regulations, and secondly that they had been presented only at the stage of the reply.

11 Finally, the Court of First Instance added that the action was not only inadmissible but moreover manifestly unfounded (paragraphs 38 to 40 of the contested judgment).

12 It noted that it clearly followed from the wording of Articles 77 and 78 of the Staff Regulations as well as from the general scheme of those provisions that, for the purpose of calculating invalidity pensions, only the fifth paragraph of Article 78 of the Staff Regulations was applicable while the fourth paragraph of Article 77 of the Staff Regulations only applied to the calculation of entitlement to old age pensions. It therefore held that the ESC was not guilty of any error of law or fault in not applying the fourth paragraph of Article 77 of the Staff Regulations in order to determine the amount of the applicant's pension.

13 In his appeal Mr Boessen takes issue with the judgment of the Court of First Instance only in so far as it declares the claims for annulment submitted by the applicant inadmissible and, moreover, unfounded.

14 In support of his appeal Mr Boessen criticizes, first of all, the part of the judgment of the Court of First Instance concerning the admissibility of the action for annulment. He submits the following grounds of appeal:

— the Court of First Instance infringed the provisions of Articles 25, 90 and 91 of the Staff Regulations by holding that Decision 157/81A, setting out details of the calculation of his invalidity pension, had set time running against him;

— the Court of First Instance wrongly states that he did not adduce any evidence such as to justify that his state of health had prevented him from submitting a complaint against Decision 157/81A within the period provided for in Articles 90 and 91 of the Staff Regulations;

— the Court of First Instance infringed the first paragraph of Article 40 of Annex VIII to the Staff Regulations in holding that Decision 157/81A had been followed only by amending decisions;

— the Court of First Instance misinterpreted the first paragraph of Article 41 of Annex VIII to the Staff Regulations and the judgment of the Court of Justice in *Grasselli* v *Commission*, above, by holding that the request submitted in 1991 had been out of time;

— the judgment of the Court of First Instance lacks sufficient grounds as regards two points: first, it did not reply to the plea that Decision No 157/81A did not give sufficient reasons for the refusal to apply the fourth paragraph of Article 77; secondly, the Court of First Instance did not sufficiently justify its conclusions concerning the applicant's health.

15 The applicant criticizes next the part of the contested judgment concerning the merits of his application for annulment. On that point, he puts forward a single ground of appeal alleging that the Court of First Instance misinterpreted the fourth paragraph of Article 77 of the Staff Regulations by holding that it did not apply to invalidity pensions.

16 In its defence the ESC submits the following arguments as regards the admissibility of the application for annulment before the Court of First Instance:

— the Court of First Instance rightly held that Decision 157/81A, by which the ESC implicitly but necessarily refused to apply the fourth paragraph of Article 77 of the Staff Regulations to the applicant and which was adequately reasoned, had set time running against the applicant for bringing proceedings;

— the Court of First Instance rightly held that there had not been any new fact since then;

— the applicant has not adduced the slightest evidence before the Court of First Instance or Court of Justice to establish that for ten years it was impossible for him to examine seriously Decision 157/81A and to bring an action against that decision.

17 As regards the merits of the action for annulment before the Court of First Instance, the ESC maintains that the Court of First Instance rightly held that the fourth paragraph of Article 77 of the Staff Regulations only applied to the determination of the amount of old age pensions. It adds that, in any event, the application of those provisions to the applicant's pension would lead to the award of a

smaller amount (36%) than that to which he is entitled by virtue of the fifth paragraph of Article 78 of the Staff Regulations.

18 According to Article 119 of the Rules of Procedure of the Court of Justice:

'where the appeal is, in whole or in part, clearly inadmissible or clearly unfounded, the Court may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, by reasoned order dismiss the appeal in whole or in part.'

19 It seems appropriate to examine first the ground of appeal concerning the merits of the action for annulment brought before the Court of First Instance.

20 According to the third to fifth paragraphs of Article 78 of the Staff Regulations:

'where the invalidity is due to some cause [other than those referred to in the second paragraph of the same article], the invalidity pension shall be equal to the retirement pension to which the official would have been entitled at the age of 65 years if he had remained in the service until that age.

The invalidity pension shall be calculated by reference to the basic salary which the official would have received in his grade if he had still been in the service at the time of payment of the pension.

The invalidity pension shall not be less than 120% of the minimum subsistence figure.'

21 According to Article 77 of the Staff Regulations:

'An official who has completed at least ten years' service shall be entitled to a retirement pension...

The maximum retirement pension shall be 70% of the final basic salary carried by the last grade in which the official was classified for at least one year. It shall be payable to an official who has completed thirty-five years' service reckoned in accordance with Article 3 of Annex VIII. Where the number of years of service is less than thirty-five, the above maximum shall be reduced proportionately.

...

The amount of the retirement pension must not be less than 4% of the minimum subsistence figure per year of service.

The pensionable age shall be sixty years.'

22 It is apparent from the wording of those provisions and from their general scheme that the Community legislature intended to refer to Article 77 of the Staff Regulations only for the purpose of determining the rate of the invalidity pension and not as regards the basis for calculation and the minimum amount of that pension. In particular, the fifth paragraph of Article 78 of the Staff Regulations specifies an amount which depends solely on the minimum subsistence figure and which constitutes the minimum amount of the invalidity pension. That method is independent of the method for determining the minimum amount of the retirement pension which, by virtue of Article 77, depends on the official's years of service.

23 As the Court of First Instance held at paragraph 40 of its judgment, the fourth paragraph of Article 77 of the Staff Regulations concerning the determination of the minimum amount of retirement pensions is therefore inapplicable to the calculation of invalidity pensions.

24 Consequently, the Court of First Instance rightly held, in the same paragraph, that the ESC had not committed any error of law when it adopted Decision No 157/81A.

25 That ground alone, although stated *ex abundanti cautela*, justifies the contested judgment. Irrespective of whether the claims for annulment submitted by Mr Boessen were admissible, they could not, in any event, have been upheld.

26 Consequently, it is not necessary to examine the other grounds of appeal, which all relate to the admissibility of those claims.

27 In those circumstances, the appeal brought by Mr Boessen is clearly unfounded. Consequently, it should be dismissed.

Costs

28 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. By virtue of Article 122 of those rules, Article 70 does not apply to appeals brought by officials or other servants of the institutions. Since Mr Boessen's appeal has been unsuccessful, he must be ordered to pay the costs.

On those grounds,

THE COURT

hereby orders as follows:

1. The appeal brought by Mr Boessen is dismissed.

2. Mr Boessen is ordered to pay the costs of the present proceedings.

Luxembourg, 24 January 1994.

J.-G. Giraud
Registrar

O. Due
President