JUDGMENT OF THE COURT (SECOND CHAMBER)
15 DECEMBER 1977 [1]

Herbert Bruns
v Commission of the European Communities

Case 95/76

Officials — Pension — Transitional system — Pension rights — Acquisition — Payment of contributions as the basis thereof — Interest — Consideration of interest — Absence — Loss of income from the investment of contributions — Compensation of the fund — Refusal

(Staff Regulations of Officials, Annex VIII, Articles 48 and 49; Staff Memorandum of the Commission No 16-470/58-F, of 19 June 1958)

It is clear from the second paragraph of Article 48 and the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials that, on the one hand, the payment of contributions is sufficient to confer full pension rights without the need to pay interest and that, on the other, those rights are acquired without the fund's being compensated for the loss of the investment income from the contributions which it would have received if the contributions had been paid within the period laid down in Staff Memorandum No 16-470/58-F, of 19 June 1958.

In Case 95/76

HERBERT BRUNS, a retired official of the Commission of the European Communities, residing at 84 Lindenallee, 5000 Cologne 51, represented and assisted by Ernest Arendt, of the Luxembourg Bar, 34/B Rue Philippe II, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt,

applicant,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Jürgen Utermann, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

defendant,

In the matter of the calculation of the applicant's pension,

1 — Language of the Case: German.

THE COURT (Second Chamber)

composed of: M. Sørensen, President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

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

I — Facts and procedure

On 19 June 1958 the Commission issued Staff Memorandum No 16-470/58-F in which the following was provided, *inter alia:*

'Concerning: Social Security and Provident Scheme

Pending the adoption in the Staff Regulations of provisions applicable to the staff with regard to social security the Commission has established a mutual insurance scheme which is to operate on the following bases:

I. *Accident insurance.*
II. *Insurance against illness, surgical operations etc.*
III. *Pensions.*

A — Pending the establishment of a pension scheme a provident fund shall be set up to which officials shall be bound to contribute from the date when they take up their duties.

This provident fund shall be financed by:
— a contribution of 7·5 % deducted each month from the salary of officials;
— a payment by the institution amounting to 15 % of the salary.
...

The provident fund shall maintain an individual account in the name of each official in which there shall be entered:
— on the credit side, the contributions of the official and of the institution together with annual compound interest;
— on the debit side, any payments made by the institution in order to maintain the official's pension rights in his former administration or institution together with the amount deducted to cover the risk of death.

At the time when the pension scheme is set up the amount in the individual accounts shall be transferred to the pension fund in accordance with detailed rules to be established at that time.

Until then, if an official leaves the service of the Community for a reason other than death before the pension scheme is established he shall be entitled to reimbursement of the sum standing to the credit of his account with the provident fund, including interest.

B — *Survivors' pension*

...'

Staff Memorandum No 16 thus contained the temporary provisions concerning the social security of officials of the Commission which were applicable until the entry into force of the Staff Regulations of Officials.

After 1 January 1962, the date when the Staff Regulations of Officials entered into force, pension rights were calculated in accordance with the Staff Regulations. Transitional provisions, in Chapter 8 of Annex VIII, governed *inter alia* the legal consequences arising when an official had withdrawn sums from his account with the provident fund in order to maintain his pension rights in his country of origin. In the present case the relevant provision is the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials, which is worded as follows:

'Where an official has exercised his option to withdraw from his account with the temporary joint provident scheme of the institutions of the Communities sums which he was required to contribute in his country of origin in order to maintain his pension rights there, his pension rights shall, in respect of the period when he was a member of the temporary provident scheme, be reduced in proportion to the sums withdrawn from his account.'

The pension rights of the applicant, a former official of the Commission, formed the subject-matter, as to the substance, of Case 113/73 which was settled out of court and removed from the Register of the Court by an Order of the Court (First Chamber) of 28 May 1975.

It should be recalled that the applicant successfully applied on the termination of his service at the end of 1969 for the severance grant provided for by Article 12 of Annex VIII to the Staff Regulations of Officials. He subsequently requested the Commission to accept the repayment of the severance grant and to award him a pension.

In the course of negotiating the abovementioned settlement the parties reached an agreement on principle. In fact the agent of the Commission addressed to the applicant's lawyer a letter dated 1 April 1974 enclosing a draft settlement which, according to the letter, 'has yet to be signed by Mr A. Borschette, Member of the Commission', and pursuant to which the Commission noted that the applicant was entitled on termination of his service as an official of the Commission for the period from 4 November 1958 to 30 September 1969 to a pension in accordance with the provisions of the Staff Regulations of Officials and that he was bound to repay to the Commission the severance grant which had been paid to him at the time, together with compound interest at the rate of 3·5 % per annum. Annexed to the letter was a calculation of the applicant's pension.

In a letter of 17 April 1974 addressed to the Commission the applicant's lawyer expressed his opinion on the draft settlement and in particular expressed reservations concerning the proportional reduction of the pension rights pursuant to the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials on the basis of the amounts which the applicant had withdrawn from his account with the temporary joint provident scheme before the entry into force of the Staff Regulations.

By a letter dated 7 March 1975 the applicant's lawyer again expressed

reservations concerning the proportional reduction, claiming that regard must be had in this connexion to the total credit balance in the applicant's account on 31 December 1961, that is to say the amounts of the contribution and the interest.

By a letter of 12 March 1975 the Commission informed the applicant's lawyer *inter alia* that settlement of the sums due to the applicant as from 1 January 1975 could be effected only '... on condition that the Commission adopts a decision formally agreeing to the settlement reached ...' and, with regard to the proportional reduction, that the agent of the Commission would discuss this with the administration and notify the result to the applicant's lawyer 'immediately'.

Subsequently, the Commission communicated to the applicant a 'notice of assessment' of his pension rights, dated 18 April 1975. It added that the notice was issued 'subject to the condition that the settlement is formally approved by the Commission'.

It is clear from the abovementioned notice that the Commission, in calculating the proportional reduction of the applicant's pension rights, did not take into consideration the interest credited to the applicant's account under the temporary joint provident scheme when it was transferred to the scheme under the Staff Regulations.

By a letter of 10 June 1975 the Commission wrote to the applicant's lawyer *inter alia* as follows:

'2. It is still a formal requirement that a decision be adopted recognizing Mr Brun's pension rights ... The necessary procedures for this have already been set in motion. The decision will thus reach you in the next few days ...

3. The point concerning the calculation of the pension rights (first paragraph of Article 49 of Annex VIII), which you raised in your letter of 7 March 1975, did not form the subject-matter of the proceedings which have just been concluded. As I have also stated to you the administration will accordingly communicate with Mr Bruns direct.'

On 20 June 1975 the Director of Personnel at the Commission adopted a decision recognizing that the applicant was entitled to a pension with effect from 1 January 1975.

On 21 August 1975 the applicant addressed to the Commission a letter containing in particular the following:

'I should be obliged if you would kindly review your calculation of the rate of pension contained in the notice of assessment of 18 April 1975, which became final through the decision of the Directorate of 20 June 1975. It appears that an error has occurred in the calculation of the reduction of the pension rights in accordance with the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials.

...

Concerning the proportional reduction of the pension rights for the period prior to the entry into force of the Staff Regulations, the entire pension, that is to say the contributions *plus* interest, must be considered in relation to the sums withdrawn. ...

...

If the Personnel Directorate cannot effect this review would you kindly forward this letter to the appointing authority as a request to take a decision within the context of Article 90 (1) of the Staff Regulations of Officials.'

Since the applicant received no reply to his request of 21 August 1975, on 15 March 1976 he lodged a complaint with the Commission within the meaning of Article 90 of the Staff Regulations of Officials.

On 9 August 1976 the Commission rejected the complaint, maintaining *inter alia* that the implied rejection of his request of 21 August 1975 that it take a decision was merely in confirmation of a previous decision, namely that of 18 April/20 June 1975 determining the rate of the applicant's pension, which had meanwhile become final.

On the rejection of the applicant's complaint he lodged the present application which was received at the Court Registry on 30 September 1976.

The Commission raised an objection of inadmissibility in a separate document, which was received at the Court Registry on 6 November 1976, and requested that Article 91 of the Rules of Procedure be applied.

On 13 December 1976 the applicant submitted his observations on that objection.

By an Order of 19 January 1977 the Court (Second Chamber) ruled that the objection must be considered together with the substance of the case and that the costs must be reserved.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General the Court (Second Chamber) decided to open the oral procedure without any preliminary inquiry.

II — Conclusions of the parties

The *applicant,* in his application initiating the proceedings, claims that the Court should:

1. Annul the decision of the Commission of 9 August 1976;
2. Order the Commission to take into consideration in calculating the applicant's retirement pension rights for the period when he was a member of the temporary joint provident scheme of the institutions of the Communities, namely from 4 December 1958 to 31 December 1961, the amount credited to his account under the said scheme at the time when the Staff Regulations entered into force;
3. Order the Commission to bear the costs.

In its statement on the procedural issue the *Commission* claims that the Court should:

1. Give a ruling on the procedural issue in accordance with Article 91 of the Rules of Procedure of the Court to the effect that the application is inadmissible;
2. Order the applicant to bear the costs.

In his reply to this statement the *applicant* contends that the Court should:

1. Dismiss the application on the procedural issue which the defendant has submitted in connexion with the admissibility of the application;
2. Order the defendant to bear the costs.

In its statement of defence the Commission contends that the Court should:

1. Dismiss the application as inadmissible;
2. Alternatively dismiss the application as unfounded;
3. Order the applicant to bear the costs.

In its reply to the statement of defence the *applicant* contends that the Court should:

1. Dismiss the defendant's application on a procedural issue for the dismissal of the application as inadmissible;
2. Deliver a ruling as requested in Heads 1 to 3 of the conclusions which the applicant has put forward in his application;
   — in the alternative, if the Court should rule in favour of the reservations expressed by the defendant concerning the form of Head 2 of the applicant's conclusions, give a ruling in favour

of that request worded as follows:
... that the Court should:

1. ...
2. Rule that for the purpose of calculating the applicant's pension rights for the period when he was a member of the temporary joint provident scheme of the Communities, namely from 4 December 1958 to 31 December 1961, consideration must be taken of the amount credited to the applicant's account under the said scheme at the time when the Staff Regulations entered into force;
3. ...

III — Submissions and arguments of the parties

Admissibility

The *Commission,* in its statement concerning its objection of inadmissibility, observes that the subject-matter of the application is the calculation of the pension received by the applicant since 1 January 1975. The calculation of the pension was established through the notice of assessment of 18 April/20 June 1975 which constitutes a measure adversely affecting the applicant within the meaning of Article 91 of the Staff Regulations of Officials.

It is not disputed that the notice of assessment was issued 'subject to the condition that the settlement is formally approved by the Commission', but that condition had not the slightest connexion with the question of the reduction of the pension rights. It was purely intended to preclude reliance upon the existence of the notice of assessment in the event of a settlement, contrary to expectations, not being attained.

The allegation made by the applicant in his application to the effect that the description 'final', which he applied to the notice of assessment in his letter of 21 August 1975, did not refer to the calculation of the rate of pension is irrelevant to the dispute. In fact the communication of the decision of 20 June 1975 rendered the notice of assessment fully valid and it could consequently have been contested as a measure adversely affecting the applicant.

The Commission maintains that the applicant should have lodged a complaint against the notice of assessment within the period of three months laid down by Article 90 (2) of the Staff Regulations of Officials and have then filed an application within the period laid down by Article 91. The applicant failed to do so.

In his letter of 21 August 1975 the applicant set out the reasons why he considers that the interest credited to his account with the temporary joint provident scheme should have been taken into consideration in calculating the reduction of his pension in accordance with the first paragraph of Article 49 and he claimed that the notice of assessment of 18 April/20 June 1975 should consequently be reviewed. He stated then that his letter was to be considered as a request that the institution take a decision relating to him within the meaning of Article 90 (1) of the Staff Regulations of Officials if the administration did not review the notice of assessment.

He did not receive a reply to that letter or to his reminders of 8 December 1975 and 2 February 1976.

In his letter of 15 March 1976, which he considered as a complaint within the meaning of Article 90 (2), the applicant again referred to the matter; on 15 June 1976 he again requested that steps be taken in accordance with his letter.

The Commission finally replied to the applicant by a letter of 9 August 1976.

The application was lodged on 30 September 1976.

The Commission maintains that under no circumstances may the application be said to be admissible, whether it is considered that the various letters from the applicant constitute a 'request' or a 'complaint'.

If, despite its wording, the letter of 21 August 1975 is considered as a complaint within the meaning of Article 90 (2) it must certainly be held that the complaint was lodged within the period prescribed, but that does not apply to the application of 30 September 1976. In accordance with Article 91 (2) it should in fact have been filed within a period of three months from the implied decision of late December 1975 whereby the request submitted in the letter of 21 August 1975 was rejected, that is to say at the latest by the end of March 1976 and not six months later.

Even if it were to be claimed that the applicant's letter dated 21 August 1975 must be considered as a 'request' the application must still be held inadmissible. In fact in that case the implied decision rejecting the request merely constitutes confirmation of the reduction of the pension rights which had already been determined in the notice of assessment.

The Commission, on the basis of the case-law of the Court (in particular the judgment of 14 December 1965 in Case 12/65, *Bauer* v *Commission* [1965] ECR 1003), claims that such confirmation by way of an implied decision of rejection is incapable of influencing in any way whatever the time-limit laid down for lodging an application against an act adversely affecting the person concerned and *a fortiori* incapable of causing a fresh time-limit to run for lodging a fresh complaint.

The opposite view, sustained by the applicant in his application, would mean that a request might be submitted *at any time*, even concerning very old administrative measures which had become final and that, after an implied or express decision rejecting it had been taken, such measures could be contested by means of a complaint and subsequently an application to the Court of Justice.

The Commission maintains that such a view cannot be considered compatible with the provisions governing judicial time-limits. In this connexion it cites the judgment of the Court of 15 June 1976 (*Wack* v *Commission* [1976] ECR 1017) in which the Court held that 'The subsequent letters of the Commission in reply to the requests submitted by the applicant merely confirmed the earlier decision and thus could not result in starting a fresh period to run in favour of the applicant.' The Court of Justice thus refused to concede that a request submitted prior to an application, as in the present case, can have the effect of extending the period for submitting an application and dismissed the application as inadmissible on the ground that the complaint against the measure adversely affecting the person concerned was not lodged within the prescribed period.

For the same reasons the Court must in the present case find:

— either that the implied decision rejecting the 'request' of 21 August 1975 merely confirmed the notice of assessment of 18 April/20 June 1975 and was not such as to start a fresh period running in favour of the applicant in which an application could be lodged, through the expedient of the complaint of 15 March 1976;

— or that the 'request' of 21 August 1975 in fact amounts to a complaint which, since it was by implication rejected at the latest at the end of December 1975, could have provided grounds for an application at the latest until the end of March 1976, which application was not submitted.

It follows that the application must in any case be dismissed as inadmissible.

The *applicant,* in his observations on the objection raised by the Commission, recalls that in April 1974 the parties arrived at an agreement on principle. The details of the settlement still required to be approved by the Commission. That approval was to take the form of a 'letter which still requires to be signed by Mr A. Borschette, Member of the Commission' (letter from the defendant's agent of 1 April 1974).

Furthermore, following the discussion the parties were also able to reach agreement on certain details of the settlement. Only the question of the calculation of the reduction pursuant to Article 49 of Annex VIII to the Staff Regulations of Officials remained outstanding.

The applicant maintains that he did not consider either the notice of assessment or the table annexed thereto concerning the calculation of the reduction previously disputed as measures adversely affecting him. He had obtained a promise from the Commission's agent that this matter would be considered by the administration. The administration clearly considered that this problem was a question of principle going beyond the applicant's case. In order to induce his superiors, which ultimately means the Commission, to take a decision, the applicant submitted his request of 21 August 1975.

At the time the applicant still saw no reason to lodge a complaint. The settlement had been properly implemented by the administration. A ground for complaint arose only when the administration persisted in its silence and the request submitted pursuant to Article 90 of the Staff Regulations was by implication rejected.

Remarking that the validity of the notice of assessment was subject to the condition that the settlement should be formally approved by the Commission, the applicant claims that the decision of the Director of Personnel of 20 June 1975 could not extinguish that condition since it was an administrative measure of a subordinate service. The decision of 20 June 1975 did not form part of the notice of assessment. It merely acknowledged the applicant's retirement pension rights and was not concerned with the calculation thereof.

Since the pension rights had been acknowledged in principle they could have been calculated. This could have been effected on the basis of the specific figures and other information contained in the notice of assessment in which the applicant had already concurred. This was what the applicant meant when he later described the ruling as 'final', in his request of 21 August 1975.

The applicant never concurred in the calculation of the reduction. In his request of 21 August 1975 he expressly requested that the calculation should be reviewed.

The Commission's claim that the reduction had already been decided in the notice of assessment is at variance with its own behaviour.

In fact the Commission's agent had again given an assurance on 10 June 1975, confirming an agreement between the lawyers, that the administration would communicate with the applicant direct concerning the calculation of the reduction. If he considered that the agreement which he had just confirmed officially was annulled by the decision of the Director of Personnel of 20 June 1975 he should have stated this in the letter whereby he notified the decision. He omitted to do so. The applicant thus continued to believe that the question of the calculation of the reduction would be separately considered by the administration. The principle of legitimate expectations also applies in ad-

ministrative law. The Commission is estopped from relying on a failure on the part of the applicant *(venire contra factum proprium).*

It must consequently be held that the objection based on the failure to observe the time-limits for lodging an application has no objective basis.

The applicant adds that he considers that since, if there has been an error in the calculation of a pension and if the award was contrary to the provisions of the Staff Regulations, notices of assessment may at any time be reviewed pursuant to Article 41 of Annex VIII to the Staff Regulations of Officials and the Commission not only may but indeed must undertake the required review.

The *Commission,* in its statement of defence, states its views *inter alia* on the argument which the applicant bases on Article 41 which, according to the Commission, does not empower an official at any time whatever to have notices of assessment which have become final confirmed or to request that his pension be reviewed, with the consequence in law that the decision refusing the request could be contested pursuant to Article 91 of the Staff Regulations by means of a complaint followed by an application. But even if Article 41 did permit an official to have the rate of his pension confirmed in certain cases, with the abovementioned consequence, this would be of no assistance to the applicant. In fact the latter is contesting not a calculation of his pension which incorporates an 'error or omission' as is provided in Article 41, but the interpretation of the first paragraph of Article 49 of Annex VIII which led to a reduction in the amount of his pension. Whilst a dispute of this nature ultimately relates to the amount of the pension it is affected by the time-limits for submitting applications laid down in Article 91 of the Staff Regulations and does not fall within the ambit of the provisions of Article 41 of Annex VIII.

With reference to the correspondence between the parties the Commission claims that the applicant was undoubtedly aware in particular that the matter of a reduction of his pension rights had been settled in a manner unfavourable to him by the notice of assessment which had become 'final' with the decision of 20 June 1975. In fact the applicant, in his letter of 21 August 1975, expressly referred not only to that notice, which he requested should be reviewed, but also to the decision.

The applicant was thus aware of the legal situation at the latest on 21 August 1975. He was thus simply mistaken when in his letter of that date he submitted a request instead of lodging a complaint and when after the time-limit of four months had expired he lodged a complaint in December 1975 instead of filing an application before March 1976.

The *applicant* in his reply to the statement of defence, and the *Commission,* in its rejoinder, provide further details of their arguments on the various issues already set out in their previous statements.

Substance

The *applicant* disputes the determination of the rate of his pension in respect of the period when he was affiliated to the temporary joint provident scheme before the Staff Regulations came into force. He considers that the provision concerning reduction under the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials has been wrongly applied.

When the administration calculated his retirement pension rights it reduced the rate of pension in view of the amounts which the applicant had withdrawn from his account with the temporary joint provident scheme in order to maintain his pension rights in his country of origin. However, for the period during which he was affiliated to that scheme

account was taken only of the sum of FB 4 545 by way of contributions which remained on his account at the time of the transfer to the Staff Regulations, and the sum of FB 27 874, which constituted interest, was not taken into consideration.

The applicant maintains that the provident scheme established by the Staff Memorandum of 19 June 1958 constituted a pension fund. The credit appearing on the 'individual' accounts consisting of contributions and the revenue from their investment were the equivalent of pension rights in the course of acquisition during the period before the Staff Regulations came into force. In fact an official who left the service early without the right to a pension received in particular the amount 'standing to the credit of his account under the temporary joint provident scheme of the institutions of the Communities at the date when the Staff Regulations entered into force, plus compound interest at the rate of 3·5 % per annum' (that is to say up to the date of leaving — Article 12 (a) of Annex VIII to the Staff Regulations of Officials).

When retirement pension rights are reduced pursuant to Article 49 of Annex VIII the decisive question is thus by how much *the credit was in fact reduced by the sums withdrawn.*

The applicant notes that under the first paragraph of Article 49 pension rights shall be reduced 'in proportion to the sums withdrawn' and claims that 'in proportion' means that it must be established what proportion the sums withdrawn bear to the amount which would have remained when the transfer to the scheme under the Staff Regulations was effected had the withdrawals not been made. The full pension corresponds to the amount remaining which was transferred to the budget of the Community. In other words, the extent of the reduction is established in proportion to the reduction in the 'account', that is to say the credit, including interest, which occurred as a result of the withdrawals.

However, the administration adopted another course for the reduction. Instead of comparing the sums withdrawn with the credit standing to the account (without withdrawals) it compared them exclusively with the contributions. Furthermore, it failed to take account of the credit balance, which remains without an equivalent from the point of view of pension rights.

The *Commission,* in its statement of defence, claims that only the provisions of the first paragraph of Article 49 are relevant. Since that article does not provide any information on the point at issue it must be interpreted on the basis of the way in which that provision, and the question of account being taken of interest, fit into the framework of the pension scheme under the Staff Regulations.

The basic principles of that scheme are laid down in Article 77 of the Staff Regulations and in Article 2 of Annex VIII thereto. According to those provisions the amount of the pension is determined exclusively on the basis of 'the ... number of years of pensionable service' and of 'the final basic salary carried by the last grade in which the official was classified for at least one year'. Years of pensionable service are calculated in accordance with the provisions contained in Article 3 of Annex VIII which relate exclusively to the period of service completed for one of the Community institutions.

If the interest entered to his account is taken into consideration, as the applicant claims that it should be, in calculating the reduction of pension rights pursuant to the first paragraph of Article 49 this gives a lower rate of reduction and thereby a greater number of years of pensionable service which in its turn affects the amount of the pension. To

effect the reduction in this manner is incompatible with Article 3 of Annex VIII. Furthermore, officials who did not make any withdrawals from their account under the temporary joint provident scheme would be unable to benefit from such additional years of pensionable service because they do not come under the provisions of the first paragraph of Article 49 of Annex VIII.

Only the provisions of Article 12 (a) of Annex VIII concerning the severance grant confer upon an official the benefit of the interest entered to his account with the temporary joint provident scheme. Those provisions do not apply to the applicant's case since, after repaying to the Commission the severance grant which had previously been paid to him, together with the interest in question, he now receives a pension on the basis of the settlement arrived at in Case 133/73.

The *applicant,* in his reply to the statement of defence, confirms that he concurs with the Commission's opinion that the question of reduction must be based solely upon the first paragraph of Article 49 of Annex VIII. That provision forms part of Chapter 8 of Annex VIII, the special provisions of which govern the problem of the transition from the temporary joint provident scheme to the pension scheme under the Staff Regulations.

The applicant emphasizes the basic differences between the provident scheme existing before the Staff Regulations came into force and the pension scheme under the Staff Regulations, and in particular the fact that the 'provident fund' mentioned in Staff Memorandum No 16, constitutes a 'mutual insurance scheme' financed by contributions and the return on the investment thereof, which was to meet its own needs whereas benefits under the scheme pursuant to the Staff Regulations are charged to the budget of the Communities (Article 83 of the Staff Regulations).

The applicant maintains that it is thus quite wrong to base an interpretation of the first paragraph of Article 49 on the role played by that provision and by the account taken of interest 'within the framework of the pension scheme under the Staff Regulations'.

In fact pension rights are determined under Article 48, which forms part of the 'transitional provisions' contained in Chapter 8 of Annex VIII, on the basis of affiliation to the temporary joint provident scheme and not, as the Commission maintains, pursuant to Articles 2 and 3 of Annex VIII, that is to say in terms of the number of years of pensionable service completed in posts under the Staff Regulations.

The applicant disputes the argument of the Commission to the effect that if the interest credited to his account were taken into account for the purposes of the reduction of his pension rights this would place him in a more favourable situation than that of officials who had not effected withdrawals. In fact, it is clear arguing *a contrario* from the first paragraph of Article 49, that if the official has *not* exercised his option to effect withdrawals he is entitled to the *full pension.* '... The amounts standing to his credit under the temporary joint provident scheme' (Article 51 of Annex VIII) are then to be transferred in full to the Communities. Amounts standing to the credit of an official if no withdrawal has been effected are stated in Staff Memorandum No 16 to be 'contributions ... together with annual compound interest'. The total pension is thus the equivalent of the credit balance consisting of contributions *plus interest* if both have been transferred unreduced to the budget of the Community.

The applicant maintains that the interest on the account has always been taken into consideration if no withdrawal from the account has been effected and, pursuant to the first paragraph of Article 49, the interest must also be taken into

consideration where pension rights have to be reduced in view of withdrawals.

The Commission in its *rejoinder* claims that the 'temporary provident scheme' referred to in Staff Memorandum No 16 was not a pension scheme properly so-called. In fact that scheme did not provide for a pension but only for the payment of a severance grant (contributions and interest) in the event of early termination of service. The corresponding provisions contained in the Staff Memorandum were subsequently re-enacted in the provisions of the Staff Regulations concerning the severance grant and the taking into account of periods of service completed before the Staff Regulations came into force (Annex VIII, first paragraph of Article 48).

On the basis of Article 77 of the Staff Regulations *all* officials are entitled to a pension, including those who had already entered the service before 1 January 1962. The first paragraph of Article 48 of Annex VIII only lays down that periods of service completed before the Staff Regulations came into force by officials who had already entered the service on 1 January 1962 must be taken into consideration in calculating the pension; it thus supplements Article 3 of Annex VIII with regard to that category of officials.

The applicant's argument, based on the alleged entitlement to the 'full pension' of officials who have not effected withdrawals, is mistaken. In fact, as the Commission has already stated, the 'temporary provident scheme' is not a scheme properly so-called, and, despite what the applicant maintains, it confers no right to a pension. Within the scope of the first paragraph of Article 49 there can accordingly be no equivalence between the full pension and the credit balance consisting of contributions and interest, whether or not those contributions and interest were subsequently transferred to the budget of the Communities.

The Commission maintains that the 'full pension' which the applicant would have enjoyed if he had not made withdrawals from his account with the scheme before the Staff Regulations came into force is to be calculated, as is the case with all his colleagues in the same situation, on the sole basis of years of service and of the last basic salary (Article 77 of the Staff Regulations; first paragraph of Article 48 of Annex VIII).

In conclusion it must be found that the applicant's request that in reducing his pension rights pursuant to the first paragraph of Article 49 of Annex VIII regard should be had to the interest credited to his account with the temporary joint provident scheme is incompatible with the principles governing the pension scheme established under the Staff Regulations.

The contested notice of assessment of 18 April/20 June 1975 which did not take into account the interest credited to the applicant's account with the temporary joint provident scheme when his pension rights were reduced pursuant to the first paragraph of Article 49 of Annex VIII, like all previous instances of the application of this provision, is thus lawful and consequently the application must be dismissed as unfounded.

IV — Oral procedure

The parties presented oral argument at the hearing on 13 October 1977.

The Advocate-General delivered his opinion at the hearing on 24 November 1977.

Decision

1 The applicant, a former official of the Commission, who entered the service of the Commission in 1958, requested and obtained on the termination of his service in 1969 the severance grant for which provision is made in Article 12 of Annex VIII to the Staff Regulations of Officials.

Subsequently he requested the Commission to grant him a pension and repaid the severance grant.

The applicant's pension rights formed, as regards the substance, the subject-matter of Case 133/73 which, following a settlement, was removed from the Register of the Court by an Order of 28 May 1975.

2 In the course of the negotiation of the abovementioned settlement the agent of the Commission addressed to the applicant's lawyer a letter dated 1 April 1974 to which was annexed a draft settlement which, according to the letter, 'has yet to be signed by Mr A. Borschette, Member of the Commission', together with a statement of account concerning the applicant's pension.

That account included a reduction in the applicant's pension rights pursuant to the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials in proportion to the sums which he had withdrawn before the entry into force of the Staff Regulations, that is, 1 January 1962, from his account under the temporary joint provident scheme which formed the subject-matter of Staff Memorandum No 16-470/58-F issued by the Commission and which he had used to maintain his pension rights in his country of origin.

3 The calculation of that proportional reduction of the applicant's pension rights became the sole point at issue between the parties in the course of the negotiations undertaken with a view to a settlement and it is the sole point of substance in the present proceedings.

That point must be resolved on the basis of the aims and of the wording of the said Staff Memorandum No 16 and of the first paragraph of Article 49 of Annex VIII to the Staff Regulations of Officials.

4 The said Staff Memorandum No 16 provided *inter alia* as follows:

'Concerning: Social Security and Provident Scheme

Pending the adoption in the Staff Regulations of provisions applicable to the staff with regard to social security the Commission has established a mutual insurance scheme which is to operate on the following bases:

...

...

Pensions

A — Pending the establishment of a pension scheme a provident fund shall be set up to which officials shall be bound to contribute from the date when they take up their duties.

This provident fund shall be financed by:

— a contribution of 7·5 % deducted each month from the salary of officials;

— a payment by the institution amounting to 15 % of the salary.

...

The provident fund shall maintain an individual account in the name of each official in which there shall be entered:

— on the credit side, the contributions of the official and of the institution together with the annual compound interest;

— on the debit side, any payments made by the institution in order to maintain the official's pension rights in his former administration or institution together with the amount deducted to cover the risk of death.

At the time when the pension scheme is set up the amount in the individual accounts shall be transferred to the pension fund in accordance with detailed rules to be established at that time.

Until then, if an official leaves the service of the Community for a reason other than death before the pension scheme is established he shall be entitled to reimbursement of the sum standing to the credit of his account with the provident fund, including interest.'

5 The first paragraph of Article 49 of Annex VIII to the Staff Regulations, which forms part of the transitional provisions of Chapter 8 of that annex, reads as follows:

'Where an official has exercised his option to withdraw from his account with the temporary joint provident scheme of the institutions of the Communities sums which he was required to contribute in his country of origin in order to maintain his pension rights there, his pension rights shall, in respect of the period when he was a member of the temporary provident scheme, be reduced in proportion to the sums withdrawn from his account.'

6 It is clear from the abovementioned statement of account that when the Commission effected the calculation in accordance with that provision it took into consideration the credit balance standing to the account at 31 December 1961, which consisted of the contributions paid by the applicant and by the institution which employed him, but did not take into consideration the interest on those sums.

7 However, since the Commission has raised a series of objections concerning the admissibility of the application it is appropriate first of all to set out the circumstances which gave rise to the dispute which forms the subject-matter of the present proceedings.

8 The applicant's lawyer, in a series of letters addressed to the Commission and bearing dates between 17 April 1974 and 7 March 1975, disputed this method of calculation, maintaining that account should have been taken of the entire credit balance in question, including interest.

The Legal Department of the Commission, in its reply of 12 March 1975 to this last letter, observed in particular that payment of the sums due to the applicant by way of pension rights as from 1 January 1975 could be effected only on condition that the Commission adopted a decision formally agreeing to the settlement concluded and stated that the agent of the Commission would discuss the proportional reduction with the administration and that the applicant's lawyer would be notified immediately of the result.

The Commission subsequently notified the applicant of a 'notice of assessment' dated 18 April 1975 concerning his pension rights 'subject to the condition that [the settlement] is formally approved by the Commission'.

It is clear from that notice that the Commission, in calculating the proportional reduction of the applicant's pension rights, did not take into account the interest standing to the credit of his account under the temporary provident scheme.

The Commission, in a letter of 10 June 1975, notified the applicant's lawyer that it was still a formal requirement that a decision be adopted recognizing the applicant's pension rights and that, with regard to the calculation of the said rights, the administration would communicate with the applicant direct.

On 20 June 1975 the Director of Personnel at the Commission adopted a 'decision' ('Verfügung') wherein the applicant's pension rights were acknowledged with effect from 1 January 1975.

The applicant, by a letter of 21 August 1975, requested the Commission to review the calculation of the rate of pension appearing in the notice of assessment of 18 April 1975 and claimed, with regard to the proportional reduction of his pension rights for the period before the Staff Regulations came into force, that the contributions and interest must be taken into account when considering the sums deducted from his credit balance under the temporary provident scheme.

Furthermore, the applicant stated that his letter was to be considered, if the circumstances so required, as requesting the appointing authority to take a decision relating to him within the context of Article 90 (1) of the Staff Regulations of Officials.

Since the applicant received no reply to his letter, on 15 March 1976 he submitted to the Commission a complaint to the same effect as the abovementioned request.

On 9 August 1976 the Commission confirmed the implied decision rejecting the request of 21 August 1975 and dismissed the claims set out by the applicant in his letter of 15 March 1976.

9 The applicant lodged an application, which was received at the Court Registry on 30 September 1976, in which he claims the annulment of the decision of rejection of 9 August 1976 and further requests the Court to order the Commission, in calculating the applicant's pension rights for the period when he was a member of the temporary joint provident scheme which existed before the Staff Regulations came into force, to take into consideration the amount credited to his account under the said scheme at the time when the Staff Regulations entered into force.

The applicant, in his reply, submitted as an alternative claim, in case the Court should concur with certain reservations expressed by the Commission concerning the form of Head 2 of his conclusions, a new version of that head requesting the Court to rule that for the purpose of calculating the applicant's pension rights for the period when he was a member of the temporary joint provident scheme of the Communities consideration must be taken of the amount credited to his account under the said scheme at the time when the Staff Regulations entered into force.

10 Since the objections raised against the admissibility of the application are closely linked to the submissions put forward by the parties, for which reason the Court decided, by an Order of 19 January 1977, to consider the objections together with the substance, the substance of the case must be considered first.

11 The system established under Staff Memorandum No 16 was a provisional scheme 'pending the adoption in the Staff Regulations of provisions applicable to the staff with regard to social security'.

In fact that scheme did not make provision for the payment of a pension but merely provided that an official whose service with the Community terminated for a reason other than death before the pension scheme was established would be entitled to reimbursement of the sums standing to the credit of his account with the provident fund, including interest.

Furthermore, it is clear from the wording of Staff Memorandum No 16 that the rules thereby laid down were intended to facilitate the transition to the pension scheme under the Staff Regulations by accumulating certain financial resources necessary to the establishment of that scheme which were to be transferred to the pension fund in accordance with detailed rules to be laid down on the entry into force of the Staff Regulations.

However, pursuant to the temporary provident scheme, account was taken of the fact that at the time in question certain servants wished to maintain their pension rights with their former administration or institution and for this purpose they were obliged to continue to pay the appropriate contributions.

The said scheme therefore permitted those servants, by debiting their account kept by the provident fund, to pay those contributions in order to maintain their pension rights.

Servants who exercised that option obtained an actual and quantifiable advantage.

12 On the other hand, the pension scheme set up under Article 77 of the Staff Regulations of Officials together with Article 2 of Annex VIII provides that the pension rights of all officials shall be calculated solely on the basis of the number of years of pensionable service acquired and of the last basic salary.

Under Article 3 of Annex VIII the sole criterion for calculating years of pensionable service acquired is the period of service completed in one of the Community institutions.

Certain aspects of the calculation of the pension rights of officials to whom the Staff Regulations apply pursuant to the transitional provisions contained in Chapter 8 of Annex VIII are governed in particular by Articles 48 and 49 of that annex.

In fact the provisions of the first paragraph of Article 48 establish that such officials are entitled to pension rights computed from the date of their joining the temporary joint provident scheme of the institutions of the Community.

13 In order to ensure an equitable transition from the temporary provident scheme to the pension scheme under the Staff Regulations it was necessary to avoid creating discrimination between officials who, since they had not effected withdrawals from their account with the transitional scheme in order to maintain their pension rights with their former administration or institution, had not already obtained a specific benefit, and officials who had effected such withdrawals from their account.

In order to avoid such discrimination it was provided in the first paragraph of Article 49 that, where an official has exercised his option to effect withdrawals from his individual account with the temporary provident scheme his pension rights under the Staff Regulations shall, in respect of the period when he was a member of the temporary provident scheme, be reduced in proportion to the sums withdrawn.

It is clear from the file that if the interest standing to the credit of an individual account were taken into consideration in the calculation of the reduction this would cause a decrease in the rate of reduction and, accordingly, a greater number of years of pensionable service acquired, which

would impair the temporal criterion of the period of service completed which governs the calculation of the years of pensionable service.

However, having regard to the aims of the first paragraph of Article 49, the constituent factors of the proportion referred to therein are, on the one hand, the sums withdrawn from the account with the temporary joint provident scheme and, on the other, the total amount of contributions paid to the credit of that account.

In fact, only the contributions paid to the provident fund are capable of providing an accurate and constant basis for the purposes of effecting the necessary comparison, since the interest remaining in the individual account of an official at the time of the transition to the pension scheme under the Staff Regulations is merely a sum the amount of which depends, on the one hand, on the pattern of the payments debited to that account and, on the other, on the investment policy of the fund.

Furthermore, this finding is confirmed by the provisions of the second paragraph of Article 48, which provides that where an official, during the whole or part of his service prior to his entry into the service of one of the Community institutions, had not contributed under the provident scheme, he is entitled, by payment in instalments, to buy in the pension rights for which he had been unable to contribute.

In fact, as stated in that paragraph: 'The amounts contributed by the official, together with the corresponding amounts contributed by the institution, shall be deemed to have been standing to the official's credit under the temporary provident scheme at the date of the entry into force of these Staff Regulations'.

It is clear from those provisions that, on the one hand, the payment of contributions is sufficient to confer full pension rights without the need to pay interest and that, on the other, those rights are acquired without the fund's being compensated for the loss of the investment income from the contributions which it would have received if the contributions had been paid within the period laid down in Staff Memorandum No 16.

14 It is clear from the foregoing that, having regard to the principles governing the pension scheme established by the Staff Regulations, it must be concluded that the Commission was justified in refusing to amend its calculation of the proportional reduction of the applicant's pension as desired by the applicant.

Consequently, the applicant's claims must be dismissed as unfounded.

15 In the circumstances it is unnecessary to consider the preliminary objections raised by the Commission.

Costs

16 Pursuant to Article 62 (2) of the Rules of Procedure the unsuccessful party shall be ordered to bear the costs.

Nevertheless, under Article 70 of the Rules of Procedure the costs incurred by the institutions in applications by servants of the Communities shall be borne by the institutions.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

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

Sørensen Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 15 December 1977.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber