Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

12 May 2021 *

(Appeal – Civil service – Former member of the contract staff – Social security – Joint Sickness Insurance Scheme (JSIS) – Article 95 of the Conditions of Employment of Other Servants of the European Union (CEOS) – Continued membership after retirement – Condition of having been employed for more than three years – Request to join the JSIS following a transfer of pension rights – Equating the credited years of pensionable service with years of service – Rejection of the request – Action for annulment – Act having an adverse effect – Order of the General Court declaring the action inadmissible – Order set aside)

In Case C-202/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 12 May 2020,

Claudio Necci, residing in Brussels (Belgium), represented initially by S. Orlandi and T. Martin, avocats, and subsequently by S. Orlandi, avocat,

appellant,

the other parties to the proceedings being:

European Commission, represented by B. Mongin and T.S. Bohr, acting as Agents,

defendant at first instance,

European Parliament, represented by J. Van Pottelberge and I. Terwinghe, acting as Agents,

Council of the European Union, represented by M. Bauer and M. Alver, acting as Agents,

interveners at first instance,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, F. Biltgen (Rapporteur) and L.S. Rossi, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

* Language of the case: French.

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By his appeal, the appellant seeks to have set aside the order of the General Court of the European Union of 25 March 2020, *Necci* v *Commission* (T-129/19, not published, EU:T:2020:131; 'the order under appeal'), by which the General Court dismissed as inadmissible his action for annulment under Article 270 TFEU against the Commission's decision of 18 April 2018 impliedly rejecting his request to join the Joint Sickness Insurance Scheme of the Institutions of the European Communities (JSIS) submitted on 18 December 2017 ('the decision at issue').

Legal context

The Staff Regulations of Officials of the European Union

2 Article 72(1) of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), as amended by Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 (OJ 2010 L 311, p. 1), provides, in essence, that an official, his spouse, where the spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants, are insured against sickness by the JSIS. The first subparagraph of Article 72(2) of the Staff Regulations provides:

'An official who has remained in the service of the Union until the age of 63 years or who is in receipt of an invalidity allowance shall be entitled to the benefits provided for in paragraph 1 after he has left the service. The amount of contribution shall be calculated by reference to the amount of pension or allowance.'

3 Article 90 of the Staff Regulations, as amended by Regulation No 1080/2010, appears in Title VII thereof, entitled 'Appeals', and is worded as follows:

'1. Any person to whom these Staff Regulations apply may submit to the appointing authority … a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. …

…'

4 Article 11(2) of Annex VIII to the Staff Regulations, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1), provided:

An official who enters the service of the Communities after:

– leaving the service of a government administration or of a national or international organisation;

or

– pursuing an activity in an employed or self-employed capacity,

shall be entitled, after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations, to have paid to the Communities the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities.

In such case the institution in which the official serves shall, taking into account the official's basic salary, age and exchange rate at the date of application for a transfer, determine by means of general implementing provisions the number of years of pensionable service with which he shall be credited under the Community pension scheme in respect of the former period of service, on the basis of the capital transferred, after deducting an amount representing capital appreciation between the date of the application for a transfer and the actual date of the transfer.

…'

The Conditions of Employment of Other Servants of the European Union

5 Article 95 of the Conditions of Employment of Other Servants of the European Union, as amended by Regulation No 1080/2010 ('the CEOS'), provides:

'… Article 72(2) and (2a) of the Staff Regulations shall not apply to a member of the contract staff who has remained in the service of the Union until the age of 63, unless he has been employed for more than 3 years as a member of such staff.'

Background to the dispute

6 The General Court summarised the background to the dispute in the following paragraphs of the order under appeal:

'1 The applicant, Mr Claudio Necci, was employed at the European Commission … as a member of the contract staff between 1 July 2009 and 30 June 2011.

2 On 27 October 2010, the applicant requested the transfer of the pension rights … which he had acquired during his service with the Italian administration to the pension scheme of the institutions of the European Union ('the PSEU'), pursuant to Article 11(2) of Annex VIII to the Staff Regulations [as amended by Regulation No 723/2004].

3 On 1 July 2011, the applicant left the Commission and retired at the age of 64.

4 By decision of 18 July 2011, the Commission determined the applicant's pension rights. It also terminated his membership of the [JSIS] on the basis of Article 95 of the [CEOS], which makes the continued application of the JSIS, for a member of the contract staff who has remained in the service of the European Union until retirement age, subject to a condition of service of more than three years as a member of the contract staff. The decision of 18 July 2011 has not been challenged.

5 On 12 February 2014, the Italian pension fund informed the Commission that the capital value representing the applicant's pension rights on the date of the application [for the transfer of pension rights] was EUR 383 570.92.

6 By email of 18 March 2014, the Commission's services sent the applicant a note for information purposes concerning the provisional calculation of his years of pensionable service and asked him to take a decision on the transfer of his pension rights. That document, which referred to Article 95 of the CEOS, drew attention to the condition that three years' actual service within the EU institutions were necessary to qualify for sickness cover with those institutions and drew to the applicant's attention the possible consequences of the [transfer of his pension rights].

7 On 11 April 2014, the applicant sent an email to the Office for the Administration and Payment of Individual Entitlements (PMO) requesting an extension of the deadline for taking a decision on the [transfer of his pension rights]. He added: "I know that I will lose the Italian sickness insurance and that I would not have cover under the Commission's JSIS. I would like to ask for more information about private cover". He was granted an extension of the deadline until 5 May 2014.

8 On 6 May 2014, the applicant accepted the provisional offer [to transfer his pension rights], which led to 16 years, 9 months and 17 days of additional pensionable years being credited to him in the PSEU.

…

11 On 14 August 2017, the Italian pension fund paid the sum of EUR 387 768.73 to the PSEU in respect of the applicant's national pension rights.

12 On 19 September 2017, the Commission adopted an initial decision crediting years of pensionable service, culminating in the applicant being credited with an additional contribution period in the PSEU of 14 years and 9 days. Following a complaint lodged by the applicant on 18 December 2017 and accepted on 14 March 2018, that credit was extended to 16 years, 9 months and 17 days.

13 On 18 December 2017, following the transfer of his pension rights, the applicant submitted a request to the PMO to join the JSIS.

14 That request was impliedly rejected on 18 April 2018, [that implied rejection constituting the contested decision], in accordance with Article 90(1) of the Staff Regulations [as amended by Regulation No 1080/2010].

15 On 18 July 2018, the applicant submitted a complaint under Article 90(2) of the Staff Regulations [as amended by Regulation No 1080/2010] against [the contested decision].

16 His complaint was rejected by decision of 19 November 2018. That decision is based on the fact that the complaint was inadmissible on the ground that it should have been submitted against the decision of 18 July 2011 determining the applicant's pension rights, in which it was stated that he was not a member of the JSIS.'

Proceedings before the General Court and the order under appeal

7 By application lodged at the Registry of the General Court on 25 February 2019, the appellant brought an action seeking annulment of the contested decision. That action was based on two pleas in law alleging, first, infringement of Article 95 of the CEOS and, secondly, in the alternative, that that provision was unlawful in the light of Article 45 TFEU.

8 The Commission contended in its defence that the action was inadmissible on the ground that it had been preceded by a complaint which was also inadmissible. In its view, the complaint was inadmissible because it should have been brought against the decision of 18 July 2011 determining the appellant's pension rights and in which it was stated that he was not a member of the JSIS ('the decision of 18 July 2011'). In the alternative, the Commission contended that the pleas put forward by the appellant should be rejected.

9 By the order under appeal, the General Court declared the action inadmissible. It held, first of all, that the decision of 18 July 2011 was an act adversely affecting the appellant which had become definitive in the absence of a complaint by the appellant. While pointing out that a staff member who has failed to bring an action against an act adversely affecting him or her cannot, by means of a subsequent request, remedy that omission unless a material new fact is such as to justify reconsideration of his or her situation, the General Court held that the transfer of the appellant's pension rights did not constitute such a fact, in particular because that transfer did not alter the appellant's situation with regard to his membership of the JSIS. The General Court thus concluded that the appellant could not, by his request of 17 December 2017 to join the JSIS, reopen to his advantage a right of action against the decision of 18 July 2011.

Forms of order sought by the parties before the Court of Justice

10 By his appeal, the appellant claims that the Court of Justice should:

– set aside the order under appeal;

– refer the case back to the General Court, and

– reserve the costs.

11 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

The appeal

12 In support of his appeal, the appellant relies on three grounds of appeal, alleging (i) distortion of the subject matter of the proceedings, (ii) infringement of the right to an effective remedy and, (iii) infringement of the principle of single applicable law.

The first ground of appeal

Arguments of the parties

13 By his first ground of appeal, the appellant alleges distortion of the subject matter of the proceedings in so far as the General Court held, in paragraph 45 of the order under appeal, that the act adversely affecting him was the decision of 18 July 2011. The appellant claims that he is not challenging that decision and that he did not have an interest in bringing proceedings against it, since the Commission was fully entitled to find that, in accordance with Article 95 of the CEOS, he could no longer be a member of the JSIS as of his retirement since he had been employed as a member of the contract staff for less than three years. By contrast, his action for annulment was directed against the contested decision, by which the Commission refused to affiliate him to the JSIS as of 19 September 2017 on the ground that the Italian pension rights transferred to the PSEU could not be treated as years of service for the purpose of that provision.

14 According to the appellant, the decision of 18 July 2011 and the contested decision are based on different grounds and therefore do not have the same subject matter, the first being based on the finding that the appellant was not employed by the European Union for more than three years and the second giving concrete expression to the administration's refusal to treat additional years of pensionable service as years of service for the purposes of Article 95 of the CEOS.

15 The appellant states that, admittedly, he was informed on 18 July 2011 that the Commission would interpret Article 95 of the CEOS as excluding years of pensionable service credited by way of a possible transfer of pension rights. However, that warning merely manifests the administration's future intention not to review the appellant's membership of the JSIS in the event of his pension rights being transferred. That warning cannot be regarded as adversely affecting the appellant since it does not directly and immediately affect his interests at the point at which he retires by bringing about a distinct change in his legal position.

16 The appellant adds that the considerations set out by the General Court in paragraphs 46 and 52 of the order under appeal concerning the fact that he consented in full knowledge of the facts to the transfer of his pension rights have no bearing on the admissibility of the action for annulment of the contested decision. He takes the view that he could not challenge the Commission's refusal to take account of the credited years of pensionable service as long as that transfer had not taken place.

17 The Commission disputes the existence of the alleged distortion and contends that the present ground of appeal should be rejected. Referring to paragraph 51 of the order under appeal, the Commission submits that the actual transfer of the Italian pension rights could not have affected the conditions for the application of Article 95 of the CEOS, since that transfer did not change the number of years during which the appellant was employed by the European Union as a member of the contract staff within the meaning of that provision. It argues that there is no link between that provision and Article 11 of Annex VIII to the Staff Regulations, as amended by Regulation

No 723/2004, which allows the number of pensionable years to be increased by the transfer of contributions paid under the national scheme. The appellant therefore mistakenly conflates the years of actual employment in the service of the European Union and the number of years of pensionable service allocated on account of that transfer.

18 According to the Commission, the decision of 18 July 2011 had a different subject matter from that of the contested decision, as the appellant himself acknowledges. Since the latter decision relates to the number of pensionable years transferred, it cannot constitute a new fact for the purposes of assessing the number of years of employment for the purpose of Article 95 of the CEOS, definitively determined by the decision of 18 July 2011. Since the years of pensionable service transferred cannot change the number of years of service within the European Union, they are not capable of materially altering the appellant's situation as compared with that which gave rise to that decision.

19 The decision of 18 July 2011 does not constitute a 'warning', as the appellant claims, nor does it state that the decision to withdraw the JSIS sickness insurance cover was only provisional. On the contrary, that former decision found that the appellant was not covered by the JSIS during his retirement and was applied immediately.

Findings of the Court

20 By his first ground of appeal, the appellant claims, in essence, that the General Court distorted the subject matter of the proceedings by holding, in the order under appeal, that the contested decision was purely confirmatory of the act adversely affecting him, namely the decision of 18 July 2011, and that there was no material new fact capable of justifying reconsideration of that decision, even though those decisions were based on different grounds and did not therefore have the same subject matter.

21 In that regard, it must be borne in mind that a measure is purely confirmatory of a previous measure where it contains no new factors as compared with that earlier measure. As regards a request for reconsideration of a previous decision which has become final, it is settled case-law that only the existence of material new facts can justify the submission of such a request (judgment of 15 November 2018, *Estonia* v *Commission*, C-334/17 P, not published, EU:C:2018:914, paragraph 46 and the case-law cited).

22 In the present case, it is clear that, as the Commission itself acknowledges, the decision of 18 July 2011 and the contested decision have differing subject matters. Consequently, the latter cannot be regarded as merely confirming the former.

23 On one hand, by the decision of 18 July 2011, the appellant's membership of the JSIS was terminated with effect from 1 July 2011, the date on which he retired, pursuant to Article 95 of the CEOS, under which such affiliation of a member of the contract staff after leaving the service is conditional on his having completed a period of employment of more than three years in the service of the European Union. On the other hand, by the contested decision, the appellant's request to join the JSIS with effect from 19 September 2017, following the transfer of his Italian pension rights, was rejected, as the years of pensionable service credited could not be treated as years of service for the purpose of that provision.

24 It follows that the request to join the JSIS based on the transfer of those pension rights constitutes a new factor, within the meaning of the case-law cited in paragraph 21 above, as compared with the decision of 18 July 2011.

25 In that regard, it cannot be considered that the subject matter of that decision was the refusal to treat the years of pensionable service credited to the appellant as years of service for the purposes of the application of Article 95 of the CEOS. Not only had the appellant not submitted a request to that effect before the adoption of that decision, but he would not have been in a position to do so, since, although he had requested the transfer of the Italian pension rights in 2010, it was only in 2017 that that transfer took place.

26 Therefore, such a refusal would have concerned a future and hypothetical situation, so that the appellant would not have been entitled to bring an action against that refusal given that he lacked a legal interest in bringing proceedings, such an interest having to be vested and current at the time when the action is brought. (see, to that effect, judgment of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraphs 83 and 84 and the case-law cited).

27 Furthermore, the General Court's finding in paragraph 51 of the order under appeal that the transfer of the appellant's Italian pension rights to the PSEU did not alter his legal situation with regard to his membership of the JSIS, just like the Commission's assertion that the appellant incorrectly conflates the years of actual employment in the service of the European Union and the number of years of pensionable service allocated on account of that transfer, are not such as to call into question the subject matter of the contested decision but relate to its merits.

28 It follows from the foregoing that, by holding that the act adversely affecting the appellant was the decision of 18 July 2011 and that his action for annulment of the contested decision was inadmissible on that basis, the General Court, in the order under appeal, distorted the subject matter of that action.

29 In those circumstances, the first ground of appeal must be upheld and, accordingly, the order under appeal must be set aside, without it being necessary to examine the second and third grounds of appeal.

The consequences of setting aside the order under appeal

30 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, after setting aside a decision of the General Court, refer the case back to the General Court for judgment or, where the state of the proceedings so permits, itself give final judgment in the matter.

31 In the present case, since the General Court dismissed the appellant's action as inadmissible and, consequently, did not examine the pleas in law relied on by the appellant in support of his action, the Court of Justice considers that the state of the proceedings does not permit final judgment to be given. Accordingly, the case must be referred back to the General Court.

Costs

32 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (Eighth Chamber) hereby:

1. **Sets aside the order of the General Court of the European Union of 25 March 2020, *Necci* v *Commission* (T-129/19, not published, EU:T:2020:131);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]