JUDGMENT OF THE COURT (FIRST CHAMBER) OF 22 OCTOBER 1975 [1]

Martin Meyer-Burckhardt v Commission of the European Communities

Case 9/75

Summary

1. *Officials — Action for annulment — Action for damages — No distinction — Time within which an action must be brought*
(Staff Regulations, Article 90 and Article 91)

2. *Officials — Action for damages — Origin — Place of employment — Legal basis*
(Staff Regulations, Article 90 and Article 91)

1. Since Articles 90 and 91 of the Staff Regulations make no distinction between the action for annulment and the action for damages as regards administrative and contentious procedure, the person concerned is at liberty, in view of the independence of the different types of action, to choose either one or the other, or both together, on condition that he brings his action within the period of three months after the rejection of his complaint.
2. A dispute between an official and the institution to which he is or was answerable concerning compensation for damage is pursued, where it originates in a relationship of employment between the person concerned and the institution, under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations and, as regards in particular the question of its admissibility, lies outside the sphere of application of Articles 178 and 215 of the Treaty and of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

In Case 9/75

MARTIN MEYER-BURCKHARDT, a retired Director of the Commission of the European Communities, residing at Horben in the Federal Republic of Germany, represented by Heinz Niederhausen, Advocate of Freiburg, with an

1 — Language of the Case: German.

address for service in Luxembourg at the Chambers of Ernest Arendt, 34b rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, Brussels, represented by its Legal Adviser, Peter Gilsdorf, assisted by Meinhard Hilf, a member of the Legal Department, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Place de la Gare,

defendant,

Application for an award of damages,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars (Rapporteur), President of Chamber, R. Monaco and A. O'Keeffe, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties during the oral procedure may be summarized as follows:

I — Facts and procedure

1. The applicant, a former civil servant in the Federal Republic of Germany, who had been an official of the European Communities from 1 July 1958, was retired on grounds of invalidity on 30 June 1967. He complains that the legislation of the Federal Republic on the subject of retirement pensions for civil servants limits and even, in some cases, prohibits the concurrent payment of a

Community retirement pension and a retirement pension granted by the Federal Republic. This limitation is apparently particularly strict in the case of a Community pension on the basis of invalidity where the maximum amount has been granted. In this case the German pension is reduced from 75 % to 12 % of the remuneration upon which it is based. This limitation arises from the combined effect of paragraph 160 b (1) and Article X (2) of the Law of 19 July 1968 (fifth law amending the provisions concerning the conditions of employment and salaries of civil servants, BGBl I 1968, p. 848) and it was applied to the applicant by the German administration for the period from 1 October 1968 to 30 June 1972.

2. Believing the provisions of German law invoked against him to be incompatible with Community law, in particular Article 5 of the Treaty, and with the Staff Regulations, in particular Article 78, the applicant brought an action based on the reduction of his German retirement pension before the Verwaltungsgericht Freiburg which, by Judgment of 28 June 1973, found against him, after dismissing an application that a preliminary ruling be requested of the Court of Justice — which, in the applicant's view, would have allowed the German court, in the light of the interpretation requested, to find that the alleged incompatibility did exist.

The applicant brought an appeal by way of a *Sprungrevision* (a direct appeal to the highest court on a point of law) before the Bundesverwaltungsgericht (Federal Administrative Court), which has not yet reached a decision. However, in a previous judgment in the case of *Ganschow,* 24 February 1972, that court found, in an identical case, that the German legislation was compatible with Community law. On that occasion the Bundesverwaltungsgericht also took the view that it was not necessary to seek a preliminary ruling.

3. The applicant estimates his loss attendant upon the reduction by 63 % of the rate of his German pension during the period from 1 October 1968 to 30 June 1972 at DM 122 486·88.

4. On 23 May 1973 the applicant submitted the following request to the Commission: 'that, in accordance with Article 169 of the EEC Treaty, the Commission should bring an action against the Federal Republic of Germany in order to put an end to the infringement of the third paragraph of Article 177 of the EEC Treaty committed by the Bundesverwaltungsgericht of the Federal Republic of Germany'.

The Commission rejected this request by a decision of 18 October 1973, by which time the applicant had already submitted a complaint on 1 October 1973, in accordance with Article 90 (2) of the Staff Regulations. This complaint was rejected by a decision of 11 February 1974.

On 18 April 1974 the applicant submitted to the Commission a further request within the meaning of Article 90 of the Staff Regulations, this time concerning the grant, on the basis of Article 215 of the EEC Treaty, of damages in respect of the loss suffered by him as a result of the Commission's refusal or omission to institute the procedure under Article 169 against the Federal Republic.

That request was rejected on 7 November 1974.

A complaint lodged on 9 September 1974 remained unanswered.

On 22 January 1975 the applicant made the present application, lodged on 31 January 1975.

II — Conclusions of the parties

The applicant claims that the Court of Justice of the European Communities should:

— order the defendant to pay to the applicant the sum of DM 122 486·88 against assignment of the debt of the same amount owed to the applicant by the Federal Republic of Germany, which is the subject of his action before the Bundesverwaltungsgericht.

If the Court should consider this application to be premature, the applicant claims that judgment should be suspended in the present case.

The Commission contends that the Court should:
— dismiss the application as inadmissible and alternatively as unfounded;
— order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. The applicant bases his action for damages on the fact that the Commission definitively refused to assist him in his proceedings against the German authorities, thereby infringing Article 24 of the Staff Regulations and causing him material damage. The Commission, as guardian of the Treaty, was bound to institute proceedings against the Federal Republic of Germany on the basis of Article 169 of the Treaty for the purpose of terminating the twofold infringement by that country of its Community obligations.

He claims that the Federal Republic of Germany is guilty, first, of an infringement of the second paragraph of Article 5 of the Treaty and of Article 78 of the Staff Regulations. The application of the first and second sentences of paragraph 160 b (1) of the Bundesbeamtengesetz (Law on federal civil servants) to retired officials of the European Communities infringes Article 5 of the Treaty in that it jeopardizes the attainment of the objective of ensuring that the Communities obtain the services of officials of the highest standard of independence, ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities.

The contested legislative provision is also said to result in a lessening of the effects of Article 78 of the Staff Regulations and to be doubly discriminatory because it is concerned only with officials, and then only with those who have left the service for reasons of invalidity.

Because the Commission has taken no steps to rectify this situation officials concerned have been reduced to bringing proceedings against the Federal Republic before the German administrative courts.

The applicant cites the case of a former official of the Commission, Hans Ganschow, whose action for a declaration that paragraph 160 b (1) of the Bundesbeamtengesetz was inapplicable by reason of its incompatibility with Community law governing the employment of officials was dismissed both by the court of first instance and by the Bundesverwaltungsgericht. Neither of those courts felt it necessary to refer a preliminary question to the Court of Justice of the European Communities on the basis of Article 177 of the Treaty.

In the same way the action brought by the applicant himself before the administrative court of Freiburg was rejected by judgment of 28 June 1973. An appeal on a point of law *(Sprungrevision)* was next brought before the Bundesverwaltungsgericht, which has not yet given judgment. Assuming from the judgment in *Ganschow* given by that court, that the latter would not refer the case to the Court of Justice under Article 177, the applicant has requested that judgment be suspended in the appeal proceedings until such time as the Court of Justice has given judgment on this application.

The second infringement of which the Federal Republic is accused, that of its

obligations under the Treaty, arises, in the applicant's opinion, from the refusal of the Bundesverwaltungsgericht to make use of the procedure under Article 177 of the Treaty. The failure to comply with Article 177 on the part of the Bundesverwaltungsgericht, which refrained from referring the matter to the Court of Justice, believing that the rules of Community law relied upon were clear and gave rise to no problems of interpretation, should also have resulted in an action for failure to fulfil an obligation. The refusal to institute these proceedings amounts to misconduct on the part of the Commission.

The probable dismissal by the Bundesverwaltungsgericht of the appeal at present pending before it will involve the applicant in the loss of his right to take further legal action against the Federal Republic of Germany in the matter of the payment of the DM 122 486·88 withheld from his German retirement pension. This loss became effective when the Commission finally refused to grant him the assistance which he sought.

2. In its defence the *Commission* contests the admissibility of the application.

It first examines the matter from the point of view of form. To the extent to which the Commission is accused of having infringed the provisions of Article 24 of the Staff Regulations an action for damages brought against the institution as employer can be founded only upon the provisions of Article 91 (1) of the Staff Regulations in conjunction with those of Article 179 of the EEC Treaty. The second paragraph of Article 215 may be relied upon where rights are invoked in the context of the conditions of service of officials only on condition that the supplementary rules of procedure laid down by Articles 90 and 91 of the Staff Regulations are applied. In so far as the applicant also wishes to allege in support of his action for damages a general failure by the Commission to fulfil its obligations, apart from the statutory relationship between the applicant and the Commission, the application must be deemed to be based in fact upon the second paragraph of Article 215 of the EEC Treaty.

(a) Considering the action for damages from the point of view of the Staff Regulations the Commission concedes that, as regards form, the application satisfies the conditions of Article 90 of those regulations. Nevertheless, it is inadmissible because it represents an attempt to evade the provisions governing time-limits for the submission of applications, since following notification to him of the Commission's decision, dated 18 October 1973 and 7 February 1974, to reject his representations, the applicant did not refer the matter of this rejection to the Court within the specified period. The rejection of the request of 23 May 1973 therefore became unassailable and the applicant could not 'acquire the opportunity of bringing a new appeal by means of a claim for damages' (Judgment of 12 December 1967, Case 4/67, *Muller (née Collignon)* [1967] ECR 373). The case-law of the Court concerning the requisite conditions for the lodging of an action for damages (Judgment of 2 December 1971, Case 5/71, *Schöppenstedt,* Rec. 1971, p. 975) cannot be relied upon because in the case invoked the question at issue was that of the admissibility of an action to establish liability, whereas an action on the basis of Articles 173 or 175 was, as a general rule, inadmissible. This case raises the problem of the admissibility of an action for damages where the applicant has exceeded the period available to him for contesting before the Court the act or omission complained of, which is the basis of his request for compensation.

Quite apart from this aspect the action for damages is in any event inadmissible because it is out of time. According to the applicant, the Commission failed to

fulfil its obligations in refraining from action at the time of the adoption of the Law of 19 July 1968 amending the Bundesbeamtengesetz. Since the first request for compensation was lodged only on 18 April 1974 it is inadmissible pursuant to Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. If the 'request' of 18 April 1974 is to be understood as a complaint within the meaning of Article 90 (2) of the Staff Regulations, the time-limit of three months laid down in that article was also not adhered to, since the Commission's alleged failure to act had been known to the applicant since 1973.

(b) In so far as the action for damages is based on Article 215 of the EEC Treaty the application is also inadmissible because, as has been demonstrated, it is out of time respect to the time-limit laid down in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. However, this is true only to the extent to which the Commission is accused of not having acted against the Federal Republic following the adoption of the Law of 19 July 1968; in so far as the complaint alleges an infringement of Article 177 of the Treaty by the courts of the Federal Republic, the time-limit appears to have been observed.

However, in the Commission's opinion there are more fundamental reasons for declaring the application to be inadmissible. In this connexion the first ground of inadmissibility may be deduced from the fact that examination of the merits of an action for failure to act or an action for damages brought by an individual on the grounds of a refusal by the Commission to institute the procedure laid down in Article 169 would require the Court to pass judgment on the behaviour of a Member State without having been seised of the matter by the Commission or by another Member State and without the Member State in question having been given a prior opportunity to submit its observations. A second ground of inadmissibility is based on the fact that Article 169 is intended to protect the general interest of the Communities, not the interests of individuals, so that any infringement of that article cannot create a right to damages in favour of individuals. The particular role assigned to Article 169 also explains why the rule enunciated by the Court in Case 5/71, *Schöppenstedt,* cited above, cannot be extended to the present case. There is a fundamental difference between, on the one hand, review by the Court, in the context of an action for damages, of the legality of a substantive measure adopted by a Community institution against which individuals cannot institute proceedings for annulment, and, on the other hand, review by the Court, as a subsidiary matter, of the legality of the behaviour of a Member State in circumstances which deny the latter the procedural guarantees set out in Article 169 of the Treaty. The Commission also believes that in particular on the matter of damages, the application does not fulfil the requirements of Article 38 of the Rules of Procedure.

Turning its attention to the substance of the case, the Commission replies first to the submission with regard to the obligation to institute proceedings for infringement of the Treaty against the Federal Republic. In its opinion, the Commission can incur liability only if it is established that it has illegally infringed a provision of Community law the objective of which — even if it is not the exclusive objective — is to ensure protection of the interests of the applicant. None of these conditions is fulfilled.

First, the Commission believes that Article 169 provides it, at the two successive stages of the procedure which it lays down, with a certain measure of discretion as to whether or not to institute the procedure for failure on the part of a Member State to fulfil an obligation. It does not deny that extreme cases may exist in which the Community

interest may oblige it to play its supervisory role, but even so such an obligation could not be the subject-matter of an action before the Court.

Furthermore, Article 169 of the Treaty is not intended directly to ensure the protection of individuals. The Member States decided that they would be answerable before the Court only to the other Member States or to the Commission. Even in the context of the procedure for preliminary rulings a failure by the Commission to fulfil its obligation of supervision does not fall into the category of provisions which an individual may invoke as a subsidiary matter.

If Article 169 of the Treaty is to be considered as a provision which is at least capable of serving the interests of individuals too, a legal obligation may be discerned only in the event of a clear infringement of the Treaty by a Member State, such that the Commission's freedom of discretion is reduced. The contested provisions of the Federal German Law concerning civil servants do not constitute a clear infringement.

Regarding the implementation of the procedure under Article 177 the Commission notes that this provision is designed to ensure, by means of cooperation between the Court of Justice of the Communities and national courts or tribunals, a uniform interpretation and application of Community law. Individuals are in no way entitled to request a preliminary ruling of the Court of Justice, still less are they able to insist upon one through recourse to Article 169 of the EEC Treaty. The Commission has retained the right to intervene under Article 169 of the Treaty to ensure the cooperation of national courts or tribunals in the context of Article 177 of the Treaty, but this could only be an extreme measure, where the attitude of the courts of a Member State, consistently disregarding in their case-law the conditions for requesting a preliminary ruling, gave reason to fear that the very mechanism of Article 177 was being rendered obsolete. Such is not the case here.

Regarding the infringement of the obligation to assist officials, laid down in Article 24 of the Staff Regulations, the Commission notes that this provision is intended to ensure that officials are assisted by the Communities where, by reason of their position or duties, they are the victims of an act punishable by law. The German Law cannot be represented as an attack on the property of the applicant or as an unjust, criminal and punishable legislative measure. Furthermore, the right to compensation laid down by the second paragraph of Article 24 presupposes that the official concerned has been unable to obtain compensation from the person who has caused the damage, whereas in this case the applicant has a means of recourse against the Federal Government before the courts. Any error of law which a national court such as the Bundesverwaltungsgericht might commit in not making use of the procedure under Article 177 of the Treaty would also fall outside the ambit of Article 24.

As a subsidiary matter the Commission examines the question of the extent to which the provisions of the Bundesbeamtengesetz are compatible with Community law. In this connexion the defendant believes that paragraph 160 b of the BBG is designed to prevent the cumulation of maximum pensions. The Judgments of 16 December 1960 (Case 6/60, *Humblet*, Rec. 1960, p. 1127) and 3 July 1974 (Case 7/74, *Brouerius van Nidek*, [1974] ECR 757) cannot be invoked in support of the application, since a reduction in a national pension is not comparable to the levying of taxes on normal remuneration. Community law contains no principle according to which national legislation on civil service pensions should be arranged in such a way that a national official transferring to

the service of the Communities should not incur the slightest disadvantage, or should even be put at an advantage, in relation to a national civil servant.

3. In his *reply* the applicant sets out the basis of his application; the infringement of the Treaty against which the Commission failed to take action consisted in the fact that the Bundesverwaltungsgericht, supported by the Federal Government, is putting an incorrect interpretation upon the third paragraph of Article 177 and is refusing, on the basis of that erroneous interpretation, to submit two important questions of Community law to the Court of Justice for a preliminary ruling.

The first question which should have been referred to the Court would have been for the purpose of ascertaining whether the Staff Regulations must be interpreted as meaning that officials of all the Member States who are in a comparable position must receive truly equal amounts by way of remuneration and pensions. On the basis of the preamble to the Staff Regulations of Officials of the European Communities, defining the objectives of those regulations, which are further specified in the Judgment of 16 December 1960 (Case 16/60, *Humblet*), the applicant proposes an answer in the affirmative. Hence, the first and second sentences of paragraph 160 b (1) of the Bundesbeamtengesetz should not be applied to retired officials of the European Communities.

In the event of a negative answer to this first question, a second question should be put on the interpretation of Article 78 of the Staff Regulations (Regulation No 31 (EEC) of 18 December 1961, OJ No 45 of 14. 6. 1962). This would be for the purpose of ascertaining whether the right to a Community invalidity pension enjoyed by an official in the service of the EEC suffering a total permanent invalidity can be affected, even indirectly, by the fact that the Member State views the suspension *in toto* of the official's right to a national pension as the legal consequence of the existence of the Community invalidity pension. The applicant suggests that this question should be answered in the negative and criticizes the interpretation put upon paragraph 160 (1) of the Bundesbeamtengesetz by the Commission, which believes that that provision is intended to deprive those officials who have worked partly in the service of the Federal Republic and partly in the service of an international or supranational institution of a double maximum pension. The Commission's analysis is incorrect because that provision is also concerned with German pensions which are not awarded at the maximum rate and moreover it does not apply to German officials leaving the service of the Communities with a Community pension but not suffering invalidity.

The applicant believes that the line of argument relating to the inadmissibility of the action for damages in so far as it is based upon the Commission's failure to act against the Federal Law of 19 July 1968 is irrelevant. The application is based upon the Commission's failure to act against the infringement by the Federal Republic of Germany of Article 177 of the Treaty.

In this connexion the applicant states that his application is based on Article 215 of the Treaty, since Article 91 of the Staff Regulations provides no legal basis for actions for damages. The independent nature of the action for damages was affirmed in the Judgment of 28 April 1971 (Case 4/69, *Lütticke*, Rec. 1971, p. 325) and in a series of more recent cases (Judgments of: 2 December 1971, Case 5/71, *Schöppenstedt*, Rec. 1971, p. 975; 13 July 1972, Case 79/71, *Heinemann*, Rec. 1972, p. 579; 13 June 1972, Joined Cases 9 and 11/71, *Cie. d'Approvisionnement*, Rec. 1972, p. 391; 24 October 1973, Case 43/72, *Merkur*, [1973] ECR 1055; 2 July 1974, Case 153/73, *Holtz and Willemsen*, [1974] ECR 675).

If, contrary to the applicant's claims, the Court of Justice may be seised by way of

a preliminary reference only of questions of interpretation of Community law having direct effect, the applicant notes that at all events Article 24 of the Staff Regulations and Article 7 of the Treaty create directly applicable rights. Furthermore, far from overwhelming the Commission with actions in its function as guardian of the Treaty, the institution of an action for damages based upon behaviour of the Commission which is contrary to the Treaty would tend to counteract an overindulgent attitude on the part of the Commission with regard to infringements of the Treaty by Member States. In this connexion the applicant emphasizes that the attitude of the Bundesverwaltungsgericht is supported by the Federal Government, which demonstrates the gravity of the attitude adopted and the necessity for intervention by the Commission.

4. In its *rejoinder* the Commission states that the applicant has still not clearly stated whether he is basing his action for damages upon Article 179 of the Treaty and the Staff Regulations, or upon the second paragraph of Article 215 of the Treaty. The Commission concedes that if the action is based upon Article 215, the limitation period of five years has not expired in so far as the application is no longer based on anything but the infringement of Article 177 of the Treaty by the Bundesverwaltungsgericht. If he is submitting his application in the context of the Staff Regulations, the applicant cannot invoke in support of the admissibility of his application the Judgment of the Court of 13 July 1972 (Case 79/71, *Heinemann* v *Commission*, Rec. 1972, p. 589), in which the Court ruled that an action for damages was admissible 'not being subject to the time-limits of Article 91 of the Staff Regulations'. In that case the Court in fact expressly stated that the action for damages under consideration was based not upon the illegality of an act but upon the provision of incorrect information. In its Judgment of 21 February 1974 (Joined Cases 15 to 33/73 *et al, Schots (née Kortner) and Others* v *Council, Commission and Parliament*, [1974] ECR 189), the Court stated that if a claim for compensation has its origin in the alleged illegality of an institution's decisions the basis for the application lies exclusively in Article 179 of the Treaty and the application is therefore subject to the time-limits of Articles 90 and 91 of the Staff Regulations.

Since the applicant did not refer the matter to the Court within three months following the final rejection of his request by letter from the Commission dated 17 February 1974, the present application for damages is inadmissible. More generally, the application to induce the Commission to institute proceedings for infringement under Article 169 is also inadmissible, since, on the one hand, the applicant has no right to claim the institution of such proceedings, nor, on the other hand, does Article 177 give him the right to refer the matter to the Court of Justice.

As to the legal basis of the application, the Commission is of the opinion that the applicant's criticisms of paragraph 160 b of the Federal Law regarding civil servants are based upon misconceptions or fall outside the context of that part of the provisions which concerns him. Thus equality of treatment as laid down by Community law cannot guarantee absolute equality for officials in their country of origin in the matter of benefits granted in that country. The second question formulated by the applicant overlooks the fact that the applicant's Community pension has not been affected. The German legislature took as its basis the general principle that officials paid out of public funds must not receive more than one maximum pension at the end of a full working life.

During the public hearing on 10 July 1975 the parties further developed the arguments adduced during the written procedure.

The Advocate-General delivered his opinion on 18 September 1975.

Law

1 The application is for an order that the Commission pay the sum of DM 122 486·88 as compensation for the damage allegedly caused to the applicant by the Commission's refusal to institute proceedings against the Federal Republic of Germany on the basis of Article 169 of the Treaty.

2 The applicant, a former civil servant of the Federal Republic and, later, an official of the European Economic Community, is contesting before the German courts the validity in relation to Community law of certain legislative provisions of the Federal Republic whereby, for the period from 1 October 1968 to 30 June 1972, he suffered an appreciable reduction in his German retirement pension by reason of the overlapping of that pension with the Community retirement pension.

The applicant's action before the Verwaltungsgericht Freiburg was dismissed on 28 June 1973 and he appealed to the Bundesverwaltungsgericht which, up to the date of this judgment, has not reached a decision.

3 However, on 23 May 1973, having learned of a previous judgment of 24 February 1972 of the Bundesverwaltungsgericht in a case to which he was not a party but which he considered to be similar, and believing that the Bundesverwaltungsgericht ought, prior to giving judgment, to have had recourse to Article 177 of the Treaty, the applicant submitted to the Commission a request within the meaning of Article 90 of the Staff Regulations of Officials for the purpose of securing the institution against the Federal Republic of proceedings under Article 169 of the Treaty 'in order to put an end to the infringement of the third paragraph of Article 177 of the EEC Treaty' which, in his opinion, had been committed by the Bundesverwaltungsgericht. This request, which was rejected, first by implication and then expressly, was followed by a complaint to the same effect, which was also rejected, by letter of 7 February 1974. On 18 April 1974, without having brought the dispute arising from the rejection of his complaint before the Court of Justice, the applicant submitted to the Commission a fresh request for an award of damages, which following an implied rejection and a complaint, which was expressly rejected on 7 November 1974, gave rise to the present action for damages.

4 According to the applicant the Commission's failure to institute proceedings against the Federal Republic in the matter of the judgment given by the

Bundesverwaltungsgericht on 24 February 1972 is the cause of the damage for which he is seeking compensation, corresponding to the reduction in his German retirement pension made under the national legislation in dispute. He claims in this respect that the provisions of the German legislation which affect his position are incompatible with Community law and that a preliminary ruling from the Court of Justice on the interpretation of the Staff Regulations of Officials would, if it had been sought, have enabled the German courts to find in favour of the existence of the alleged incompatibility.

5 According to the Commission the application is inadmissible both in the event of its being founded upon Article 179 of the Treaty and on the Staff Regulations of Officials and in the event of its being based on Article 215 of the Treaty.

6 In support of his application the applicant has relied upon Articles 178 and 215 of the Treaty and Article 179 thereof and on the Staff Regulations of Officials.

It is therefore necessary to ascertain, for the purpose of deciding the admissibility of the application, the provisions upon which the latter should be based.

7 According to Article 179 of the Treaty the Court of Justice has jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the conditions of employment. Under Article 91 of the Staff Regulations of Officials such disputes include those of a financial character, in which, moreover, the Court of Justice is given unlimited jurisdiction. Accordingly, a dispute between an official and the institution to which he is or was answerable concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations and, as regards in particular the question of its admissibility, lies outside the sphere of application of Articles 178 and 215 of the Treaty and of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

8 The applicant has based his application in particular upon an infringement by the Commission of Article 24 of the Staff Regulations on the protection

due by institutions to officials. Furthermore, by submitting a request and a complaint the applicant has himself followed the procedure outlined in Articles 90 and 91. The admissibility of the action must therefore be considered in the light of those provisions.

9 In this connexion the Commission claims that the present application is inadmissible because the applicant has failed to bring an appeal before the Court within the period of three months laid down in Article 91 (3) of the Staff Regulations against the rejection, by letter from the Commission of 7 February 1974, of his first complaint of 1 October 1973 and that he cannot, by means of the present action for damages, make good this omission.

The applicant replies that in relation to the action for annulment, the action for damages is an independent type of action subject to specific conditions as to admissibility, from which it follows that his action, which was brought within a period of three months following the rejection of his complaint concerning the refusal to grant him compensation, is admissible.

10 Although the action for annulment and the action for damages are indeed distinct types of action, it is none the less the case that, within the context of disputes between officials and the institutions, Articles 90 and 91 of the Staff Regulations make no distinction between them as regards both the administrative and the contentious procedures to which they may give rise.

In this connexion it is of significance that both Article 178 of the Treaty and Articles 90 and 91 of the Staff Regulations refrain from defining the nature of the action available in the event of rejection of a complaint through administrative channels.

According to Article 91, in proceedings relating to the legality of an act adversely affecting the applicant, the Court has jurisdiction, whatever the nature of the action.

11 Therefore, as from the date of rejection of his complaint of 1 October 1973 by letter of the Commission of 7 February 1974, the applicant could, within the period of three months, have brought before the Court an action concerning the legality of an act adversely affecting him, and the financial consequences which might have arisen therefrom.

It should be noted that the applicant has based his right to compensation precisely upon the illegality of the rejection of his complaint, thereby

acknowledging that a finding of the illegality of that rejection combined with his claim for damages form the subject-matter of the action.

He was at liberty, in view of the independence of the different types of action, to chose either one or the other, or both together, but he had in any event to bring his action within the period of three months after the rejection of his complaint of 1 October 1973.

12 The application of 22 January 1975, registered on 31 January 1975, was registered after the expiry of that period.

13 For the sake of completeness it should be noted that even if the action could be based upon Article 215 of the Treaty and avoided the procedural rules contained in Article 90 and 91 of the Staff Regulations it would nevertheless be out of time, since it was brought after the expiry of the period prescribed in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

In fact, since the claim for damages submitted to the institution was registerd with it on 30 April 1974, and since the institution had not defined its position within the period of two months laid down in the second paragraph of Article 175, the action should have been brought within a further period of two months, which was not done.

Even if the complaint relating to the rejection of the claim for compensation, which was registered on 9 September 1974 and rejected in its turn on 7 November 1974, were considered to constitute the application referred to in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, the position remains the same.

14 Accordingly, the application must be dismissed as inadmissible.

Costs

15 The applicant has failed in his submissions.

According to Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

However, according to Article 70 of the Rules of Procedure, in proceedings commenced by an official of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

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

Monaco Mertens de Wilmars O'Keeffe

Delivered in open court in Luxembourg on 22 October 1975.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 18 SEPTEMBER 1975

My Lords,

The genesis of the dispute in this case lies in legislation of the Federal Republic of Germany designed to prevent the cumulation of pension benefits by those who have spent part of their working life in the service of that State and part in the service of an international or supranational institution. The applicant, Herr Meyer-Burckhardt, is a retired official of the Commission of the EEC who, before entering its service, had held office for a very long period in the German civil service. He has found that, under the German legislation in question, the result of his receiving a pension from the Commission has been to reduce the amount of his German civil service pension, a reduction which attained considerable proportions during the period to which the application pertains.

In essence, the applicant claims damages from the Commission for its alleged