

interpreted to mean that where its application is likely to result in a breach of a superior rule of law such as the principle of equality among officials whose circumstances are

similar, the administration is obliged, in order to avoid such a result, not to apply the weighting fixed for the place where the official was last employed.

In Case 156/78

FREDERICK H. NEWTH, a former official of the Commission of the European Communities, residing at 88 Avenue Léopold Wiener, 1170 Brussels, represented by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg c/o Arie Gulden, 9 Rue de la Montagne, Trintange,

applicant,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Alain Van Solinge, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, 36 Rue de Praetere, 1050 Brussels, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser at the Commission, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 20 April 1978 rejecting the complaint submitted by Mr Newth and for the payment in Belgian francs of the allowances due to him,

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, P. Pescatore 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 procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

#### I — Facts and procedure

Mr Newth, who was born at Bromley (Kent), United Kingdom, on 18 March 1923, is a British subject. He was recruited by the Commission, in accordance with Article 29 (2) of the Staff Regulations, as a director of the Joint Research Centre at Ispra in Grade A 2. He took up his duties on 1 May 1975. By decision of 28 September 1977, notified to him on 7 October 1977, Mr Newth was retired by the Commission in the interests of the service with effect from 1 November 1977. Retirement took place in accordance with Article 50 of the Staff Regulations, which provides that:

“An official holding a post in Grade A 1 or A 2 may be retired in the interests of the service by decision of the appointing authority.

Such retirement shall not constitute a disciplinary measure.”

The applicant had been recruited in Belgium and, when he was retired, he had expressed the intention of returning to Belgium. He therefore asked the administrative authority to pay in Belgian francs the allowances to which he was entitled under the third paragraph of Article 50 of the Staff Regulations. The administrative authority refused and he submitted to the Commission a complaint through official channels within the meaning of Article 90 (2) of

the Staff Regulations, the purpose of which was to obtain payment of the allowance in Belgian francs.

That complaint was rejected by the Commission on 20 April 1978. The applicant then lodged the present application, which was received at the Court Registry on 19 July 1978.

#### II — Conclusions of the parties

The *applicant* claims that the Court should:

- “(1) Declare that the express rejection of the applicant’s complaint by the defendant on 20 April 1978 is null and void;
- (2) Declare and adjudge that the applicant is entitled to the payment in Belgian francs of his allowances, both principal and subsidiary;
- (3) Declare and adjudge that the defendant must adjust the applicant’s account, if necessary under the supervision of the Court;
- (4) Order the defendant to pay the arrears due, that is to say, Bfrs 200 000, subject to the applicant’s right to amend that figure during the proceedings;
- (5) Order the defendant to pay the costs.”

The *Commission* contends that the Court should:

- “— Dismiss the application as unfounded;

— Subject to due reservations, order the applicant to pay the costs.”

The procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without holding any preparatory inquiry.

### III — Summary of the submissions and arguments of the parties

In support of the application the applicant has put forward four principal submissions but in order to assess them correctly it is first necessary to refer to the rules and general principles applicable to the payment of the remuneration and allowances provided for by the Staff Regulations, on which the defendant relies in its defence.

#### *Preliminary general and theoretical statement concerning the currency used for the payment of remuneration, pensions and allowances*

The *defendant* seeks to show that remuneration is paid in the currency of the official's place of employment and is subject to weighting at a rate which is fixed for each country of employment. A pensioner, on the other hand, may elect to have his pension paid either in the currency of his country of origin or of his country of residence or of the country in which he was last employed. The allowances paid by virtue of Regulation No 2530/72 of the Council of 4 December 1972, Official Journal L 272, and Regulation No 1543/73 of the Council of 4 June 1973, Official Journal L 155, are paid in the currency of the Community country where the recipient provides proof of residence.

From an examination of those examples the defendant concludes that “the Staff

Regulations provide, first, that where a sum is subject to weighting, payment is, with the exception of pensions, made in the currency of the country whose weighting is applied and, secondly, that where that sum is weighted at a rate other than that fixed for Belgium, it is paid at the rate of exchange in force on 1 January 1965”.

On the basis of the principles thus laid down the defendant considers that the allowance — which forms the subject of the action — is, in accordance with the fifth paragraph of Article 50 of the Staff Regulations, to be weighted at the rate fixed for the place where the official was last employed, which means in this instance at the rate fixed for Italy.

Furthermore, in the light of the close link between the weighting and the currency of payment, the latter can only be the currency of the last place of employment, that is, Italian currency.

The defendant maintains that that solution is in accordance with the principles applied by the Staff Regulations and cannot be opposed by reference to the rules relating to pensions. In that connexion the defendant refers to the opinion of Mr Advocate General Mayras in the case of *Fabrizio Gillet v Commission of the European Communities* [1975] 1 ECR at p. 479, in which he stated that:

“It is the scheme of payment of pensions which should be revised so that every pension which is weighted ought compulsorily to be paid in the currency of the country in respect of which the weighting is calculated.”

The *applicant* considers the Commission's reasoning to be a syllogism “which gives rise to misapprehensions”, most of which are incorrect. In that connexion he refers to the various examples quoted in order to show that the general principle deduced

is already subject to an exception as regards pensions.

The applicant then puts forward his own view, by which he seeks to show that, as regards remuneration, it is logical for all officials to be paid in the currency of the country where they are employed, having regard to the fact that they are obliged to reside in that country and to the need to avoid the existence of flagrant disparities, whereas, as regards pensions, an employee regains his freedom of establishment and may be paid in the currency of his country of residence subject always to observance of the principle of equality of treatment of officials.

The applicant considers that that system is more coherent than the Commission's, which is based on a rule and exceptions. Even the opinion of Mr. Advocate General Mayras may be explained on the basis of the principle of equality since, in the case of pensions, it was necessary to avoid their being increased as a result of the weighting and "since there is no reason to create situations of privilege".

The *defendant* observes that "although he does not contest the accuracy of its statement, the applicant contests the conclusions drawn from it".

The defendant states once again that "Contrary to the statement made by the applicant ... that system is characterized not only by the use of the rates of exchange accepted by the International Monetary Fund on 1 January 1965 but also by a close link between the currency of payment and the weighting".

Thus, under the rules relating to pensions, the weighting applicable is that fixed for the country of the Communities

where the retired official declares his home to be (Article 82 of the Staff Regulations) and the same applies as regards the allowances. The defendant therefore considers that the general rule which it has put forward is confirmed.

*First submission relating to the statement of reasons for the decision to reject the applicant's complaint*

The Commission had based its rejection of Mr Newth's complaint on the fifth paragraph of Article 50 of the Staff Regulations, which it interpreted by stating that

"the allowance which may be claimed by an official who has been retired in the interests of the service is weighted at the rate fixed for the place where the official was last employed. All the related provisions of the Staff Regulations and those adopted in implementation of those regulations confirm the indissoluble link between the weighting applicable to the amounts fixed and the currency in which those amounts are to be paid. The basic reason for that is clearly that the weightings which are at present applicable are *inter alia* dependent upon the par values in force at the date referred to in Article 63 of the Staff Regulations, that is, on 1 January 1965.

The result of seeking to pay in a currency other than Italian currency (for example, in Belgian francs) an allowance which under the Staff Regulations is weighted at the rate fixed for Italy, would be absolutely contrary to the economic significance of that weighting".

The *applicant* does not accept that reasoning, since "no precise arrangement

for payment it provided for by Article 50 of the Staff Regulations and reference must therefore be made to Article 63 as the allowance is substituted for the remuneration”.

Furthermore, such reasoning would result in penalizing an official who, being already resident in Belgium before his appointment to Ispra, becomes subject to the rules laid down for officials living in Italy where “the cost of living is not particularly high”.

The *defendant* maintains that recourse to the rules laid down in Article 63 “cannot be justified” for two reasons:

- First, that provision provides that remuneration shall be paid “in the currency of the country in which the official performs his duties” and as Mr Newth’s duties have ended it is inapplicable;
- Secondly, even assuming that it is possible to replace the terms of that article by “currency of the country where the applicant takes up residence after termination of service” (an unjustified interpretation according to the wording of Article 63) it would follow that the weighting to be applied would be that of the country of residence, which contradicts the clear wording of the fifth paragraph of Article 50.

According to the *applicant*, the problem raised by Article 50 is that of the lacuna in the text, which does not specify the currency in which the allowance must be paid. The Commission is trying to fill that lacuna by reasoning, even though it might have drawn the Council’s attention to its existence and should have found a provisional solution consisting in the

making of advance payments whilst referring the matter to the Community legislature. Moreover, even if the Commission considered that it was required to take a final decision it could not just refer to the final paragraph of Article 63 and set aside the first two paragraphs. The applicant maintains that, in fact:

Either “the allowance is a form of continuing remuneration, in which case the applicant, who is residing in Belgium, must be paid in Belgian francs”;

Or it is a sort of pension (“temporary allowance”, “an anticipated pension substitute”);

Or it is a temporary allowance, like that provided for by Article 41 of the Staff Regulations or those referred to by the regulations which provide for the various forms of voluntary termination of service;

In the last two cases payment is made in the currency of the country of residence. Thus, whichever argument is accepted, the applicant is entitled to payment in Belgian francs.

The *defendant* maintains that “the detailed rules relating to the allowance in question, as laid down by Annex IV to the Staff Regulations, show that it differs radically from remuneration or a pension”.

It considers that even if the allowance in question were comparable to that provided for by Article 41 of the Staff Regulations the latter is weighted “at the rate fixed for the place where the official was last employed” and thus the mode of payment is the same as that provided for by the fifth paragraph of Article 50 of the Staff Regulations.

As regards the allowances referred to by the regulations providing for voluntary termination of service, they involve a system of payment which is peculiar to them and which cannot be transposed. Finally, the defendant points out that the fifth paragraph of Article 50 of the Staff Regulations is quite clear in providing expressly that the weighting applicable shall be that fixed for the place where the official was last employed.

*Second submission relating to the interpretation of the fifth paragraph of Article 50 of the Staff Regulations*

The *applicant* maintains that as officials in Grades A 1 and A 2 do not enjoy the same stability of employment as other officials, compensation is provided by means of the provision in question. In this instance in particular the duties of a director of the Research Centre are "liable to modification or termination on the adoption of each budget".

The *defendant* contests that interpretation and points out that as a counterpart to the absence of stability in their duties officials in Grades A 1 and A 2 benefit from conditions of employment which differ greatly from those normally applicable (recruitment without competition, exemption from the probationary period and from periodic reports). Moreover, the applicant's duties were not linked to the research programmes and thus were not dependent upon the carrying out of a particular project. His duties were, therefore, no more temporary than those of any other official and the possibility that his service might be terminated at any time was "largely compensated for by the existence of conditions of employment which are more favourable than those applying to officials in general".

The *applicant* emphasizes the "anomalous" nature of that "system of dismissal *ad nutum*" and replies that:

- The procedure for recruitment without competition is justified by the need to select the officials *ad libitum*, having regard to the need for the institutions to recruit officials having very high qualifications;
- The absence of periodic reports is justified by the absence of opportunities for promotion and German terminology refers to officials in Grades A 1 und A 2 as "politische Beamten" [political officials];
- The duties of director of the Research Centre are, in fact, temporary in nature, as a result of "the crisis affecting" the Centre. Moreover "the applicant replaced an official holding a temporary posting and was in turn replaced by another such official". It would therefore be logical for payment of the allowance to be made in Belgian francs by way of compensation.

The *defendant* considers that the compensatory nature of the conditions of employment of officials in Grades A 1 and A 2 appears to have been acknowledged by the Court, which considers that "The power conferred by Article 50 must be considered in the light of the fact that under the terms of Article 29 (2) of the Staff Regulations such officials may be recruited by a procedure other than the competition procedure and that under Article 34 they are not required to serve a probationary period" (judgment of the Court of Justice of 11 May 1978 in Case 34/77, *Oslizlok v Commission of the European Communities*, [1978] ECR 1099.

It disagrees with the allegation that there has been a succession of directors, stating that the applicant himself was the

first “director for approved projects” and that after his departure “a vacancy notice was published, whose aim was to fill that post on a permanent basis”. The defendant therefore takes the view that the position of officials in Grades A 1 and A 2 is not so anomalous as to justify payment of the allowance provided for in the case of retirement in Belgian francs with application of the weighting fixed for Belgium.

*Third submission relating to discrimination between officials*

The applicant observes that as a result of his recruitment as a director at Ispra he “receives an allowance which is 40 % less than that which he would receive if he had not been recruited to the Research Centre”.

The defendant points out that the fifth paragraph of Article 50 of the Staff Regulations is clear in its reference to the weighting applicable and therefore, in accordance with the general principle which it has shown to exist, the allowance can only be paid in the currency corresponding to that weighting. Moreover, the Commission considers that the solution recommended by the applicant — payment of the allowance in Belgian francs with application of the weighting fixed for Italy — “would result in awarding the applicant an amount higher than that received by an official in the same grade who was last employed in Belgium and who has continued to reside in that country after being retired.” The defendant also observes that in such a case the amount of the allowance in lire would be greater than the amount of the last basic salary.

The applicant emphasizes once again that the reference to the fifth paragraph of Article 50 is not conclusive, since as regards the present case, in which the official whose post has been terminated is taking up residence in a country other than that in which he was employed that article does not specify the manner in which the allowance is to be calculated. Thus, the application of the weighting alone may raise a problem more from the point of view of equity than from the point of view of the text. However, in the light of the “anomalous” situation in which the applicant finds himself as regards the possibility of being dismissed *ad nutum*, it appears that a combination of the weighting with payment in Belgian francs “would not necessarily be iniquitous” *a fortiori* since, in this instance, “the problem is a false one”, as the applicant is not asking to have the weighting applied to him. “Whatever the text applied by analogy, what he is asking for is that he be paid in Belgian francs without conversion and reconversion”.

The defendant observes that the effect of that argument would be to deprive the fifth paragraph of Article 50 of the Staff Regulations of all meaning and that, furthermore, that paragraph does not make any distinction according to whether or not the applicant resides in the country where he was last employed.

*Fourth submission relating to the inapplicability of the fifth paragraph of Article 50*

The applicant maintains that the fifth paragraph of Article 50 of the Staff Regu-

lations conflicts with the principles of equality between officials and that, as a result, it "violates the general principles of law".

In the *defendant's* view the applicant is relying on a principle which is too general and does not specify whether it concerns all officials, all former officials, or only officials who have been retired from their posts in accordance with Article 50 of the Staff Regulations. It is, therefore, unable "to refute such a submission".

The *applicant* states that his position involves discrimination as compared, first, with those officials who are in employment at Brussels, with retired officials and with those who have taken advantage of voluntary termination of service and, secondly, "with officials who were employed in Brussels and continue to reside there or even take up residence in Italy". The applicant thus relies on a plea of violation of the principles of "equality between officials" and rejects in advance the possible application in the instance of the case-law in the aforementioned *Gillet* case, on the ground that that case concerned acquired rights which "derived from successive sets of regulations".

The *defendant* considers that there can be no discrimination as between the applicant and officials who are still in employment, having regard to the difference in nature between the allowance in question and the remuneration of officials.

As regards pensions, "their system of payment, which is outside ordinary law, prevents any useful comparison from being made".

Finally, as regards the allowance paid to those officials who have taken advantage of voluntary termination of service the aim of that allowance was different, since it compensated those officials whose duties came to an end following either the merger of the executive bodies of the Communities (Regulation No 259/68) or the recruitment of officials who were nationals of the new Member States (Regulations No 2530/72 and 1543/73). Nor does the Commission detect the existence of discrimination in the difference which exists between the position of the applicant and that of the "officials who were employed in Brussels and continue to reside there or even take up residence in Italy". Referring to the case-law in the *Gillet* case the defendant considers that even if the applicant did suffer damage as compared to the other officials to whom reference has just been made, that "could not constitute evidence of discrimination", sufficient to entail the illegality of the fifth paragraph of Article 50 of the Staff Regulations.

Finally, the Commission considers that the case-law laid down in *Gillet* is applicable in this instance, since, first, that case concerned an alleged difference of treatment resulting from the application of rates of exchange accepted by the International Monetary Fund and, secondly, "a reading of the paragraph in question shows clearly that it is of general application":

"Although it is for the Council to adapt the regulations to economic realities and thus to seek the means of alleviating any loss suffered by officials residing in a country whose currency has been substantially devalued, that cannot mean that the existing wording of Article 63 is illegal or that in consequence it is inapplicable within the meaning of Article 184 of the EEC Treaty".



IV — Oral procedure

giving a detailed account of the allowance paid to Mr Newth.

The parties presented oral argument at the hearing on 15 March 1979, when they gave their replies to questions put to them. They produced fresh documents

The Advocate General delivered his opinion at the hearing on 3 May 1979.

## Decision

- 1 The application lodged on 18 July 1978 seeks to obtain the payment in Belgian francs of the allowance to which the applicant is entitled by virtue of Article 50 of the Staff Regulations.

The facts which led up to the lodging of the application are as follows:

- 2 On 1 May 1975 the applicant was recruited in Grade A 2 under Article 29 (2) of the Staff Regulations as a director at the Ispra Joint Research Centre.
- 3 By decision of 28 September 1977, adopted on the basis of the first paragraph of Article 50 of the Staff Regulations, the applicant was retired in the interests of the service with effect from 1 November 1977 and awarded a decreasing allowance calculated in accordance with the terms of Annex IV and weighted in accordance with the fifth paragraph of Article 50 at the rate fixed for the place where he was last employed.
- 4 As the Commission considers a close link to exist between the weighting and the currency of the country where the official was last employed, it pays that allowance in Italian currency.
- 5 It is established that on his recruitment the applicant was working and residing in Belgium and that following his dismissal he returned to Belgium and the applicant therefore requests that his allowance be paid to him in

Belgian francs without conversion into Italian lire, that the Commission adjust his account and that it be ordered to pay the arrears due.

- 6 In support of his conclusions the applicant relies on three submissions, which will be considered in turn.
- 7 In a first submission the applicant maintains that as Article 50 does not make any express provision for the currency in which the allowance payable on retirement in the interests of the service is to be remitted that lacuna must be filled by analogy with the rules governing payment of salaries laid down in Article 63 of the Staff Regulations, payment of pensions laid down in Article 82 of the Staff Regulations and payment of the allowances provided for by the regulations concerning premature termination of service following the merger of the executive bodies of the Communities and the accession of the new Member States (Regulation No 259/68 of the Council of 29 February 1968, Official Journal, English Special Edition 1968 (I), p. 30, Regulation No 2530/72 of the Council of 4 December 1972, Official Journal, English Special Edition 1972 (1-8 December), p. 11, and Regulation No 1543/73 of the Council of 4 June 1973, Official Journal L 155 of 11 June 1973, p. 1), since the texts which embody those rules establish a direct link between the place where the persons entitled to the pension or allowance declare their home to be and the weighting applicable (whose aim is to compensate for the national variations in the cost of living) and thus by implication indicate the corresponding currency of payment.
- 8 However, it does not appear that it is possible for reasoning by analogy to extend the application of those general rules to Article 50, which deals with a very special situation and whose fifth paragraph established a close link between the weighting and the place where the official was last employed, an expression which cannot be interpreted as meaning place of "residence".
- 9 In a second submission the applicant maintains that the impermanence of the duties performed at that level justifies the existence of special rules for the allowances paid in the case of termination of service.
- 10 It is, however, of no importance in this instance whether the duties performed were undertaken only provisionally or on a permanent basis, since

the essential factor is the appointment of the applicant as an official, even if that appointment takes place in a grade in which the person appointed may be retired in the interests of the service at the discretion of the appointing authority and by its decision.

- 11 It is therefore necessary to consider only the consequences of the premature termination of service under Article 50 and not the causes of that termination.
  
- 12 In a third submission the applicant maintains that the application of Article 50 as interpreted by the Commission results in discrimination, since he receives an allowance which is considerably less than that which would be received by an official of the same grade who had worked in Brussels. It must be noted that the Commission's calculations show that the applicant in fact receives 30% to 35% less than an official whose last place of employment was in Brussels.
  
- 13 It is clear that the existence of such a situation is astonishing, particularly as it may be regarded as normal in the present circumstances for the applicant, who left his place of residence in Brussels to take up his duties at his place of employment, to have returned to his former place of residence as soon as he terminated his service. The Commission is, moreover, very conscious of the injustice of that situation, since it is still considering how to make appropriate provision for an equitable solution to such cases, which, moreover, are not very common. Originally, no weighting was applied to the allowance provided for in Article 50. The present provision was drawn up in 1971 and the Commission has just submitted fresh wording to the Council which would introduce into Article 50 application of the weighting fixed for the place of residence. The applicant therefore suffers discrimination as compared to other officials in a comparable situation, for example, those to whom the regulations relating to premature termination of service were applied following the merger of the executive bodies and the accession of the new Member States, or those whose last place of employment was Brussels and who take up residence in Italy. That situation is caused by the application of a general rule, which, in the applicant's special case, constitutes a breach of the principle of equality among officials whose

circumstances are similar. In order to avoid that discrimination and very considerable financial losses an official in the position of the applicant would therefore be obliged to take up residence at the place where he was last employed. The fifth paragraph of Article 50 must therefore be interpreted to mean that where, as in the present case, its application is likely to result in a breach of a superior rule of law, the Commission is obliged, in order to avoid such a result, not to apply the weighting fixed for the place where the official was last employed.

- 14 By virtue of Article 91 of the Staff Regulations the Court has unlimited jurisdiction in disputes of a financial character and accordingly requests the Commission to determine the rights of the applicant with all due precision.

#### Costs

- 15 The Commission has failed in its submissions.
- 16 Article 69 (2) of the Rules of Procedure, under which the unsuccessful party is to be ordered to pay the costs, is applicable.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Declares that the applicant is entitled to payment of the allowance referred to in the fifth paragraph of Article 50 of the Staff Regulations, expressed in Belgian francs, weighted at the rate fixed for Belgium;

2. Orders the Commission to adjust the applicant's account and pay him the arrears due to him;
3. Orders the Commission to pay the costs.

Mackenzie Stuart

Pescatore

Touffait

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte

A. J. Mackenzie Stuart

Registrar

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL  
DELIVERED ON 3 MAY 1979<sup>1</sup>

*Mr President,  
Members of the Court,*

The applicant in the proceedings in which I am about to give my opinion entered the service of the Communities on 1 May 1975 in accordance with the terms of Article 29 (2) of the Staff Regulations of Officials and was appointed to the Joint Nuclear Research Centre at Ispra as a director in Grade A 2. By decision of 28 September 1977, adopted in accordance with the first paragraph of Article 50 of the Staff Regulations, his employment was terminated with effect from 1 November 1977. That provision is worded as follows:

“An official holding a post in Grade A 1 or A 2 may be retired in the interests of the service by decision of the appointing authority”.

Accordingly, the applicant receives the allowance provided for in the third paragraph of Article 50 and Annex IV to

the Staff Regulations, in relation to which the fifth paragraph of Article 50 provides that:

“The allowance and the total remuneration last received as referred to in the preceding paragraph shall be weighted at the rate fixed for the place where the official was last employed”.

Following the termination of his employment the applicant took up residence in Brussels, where he had for many years been employed in a private company and had his place of residence before he entered the service of the Communities. He therefore considers that the aforementioned allowance must be paid in Belgian francs and without previous conversion into Italian lire on the basis of the par values in force on 1 January 1965. Since the administrative authority rejected his request he submitted a complaint through official channels to the appointing authority on 17 January 1978. That complaint was

<sup>1</sup> — Translated from the German.