

auxiliary staff from 6 October 1964 to 5 October 1965, and the Commission's decision of 17 November 1980 refusing to recognize for the purposes of the Community pension scheme Mr Garilli's period of service as a member of the auxiliary staff from 1 September 1964 to 31 March 1967;

2. Orders the Commission to pay the costs.

O'Keeffe

Bosco

Koopmans

Delivered in open court in Luxembourg on 23 February 1983.

P. Heim

A. O'Keeffe

Registrar

President of the First Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS
DELIVERED ON 11 NOVEMBER 1982¹

*Mr President,
Members of the Court,*

the pension rights of employees of the
Community.

Two actions have been brought before the Court by officials in connection with Article 2 (b), Article 3, the first and second paragraphs of Article 40 and Article 52 (b) of the Conditions of Employment of Other Servants of the European Communities (hereinafter referred to as "the Conditions of Employment").

These two cases, which the Court has ordered to be joined, relate to the Commission's use of auxiliary staff and the consequences thereof with regard to

I — The facts are as follows:

Armando Toledano Laredo, the applicant in Case 225/81, was engaged by the Commission of the European Communities as a "scientific assistant" assigned to the Directorate-General for Overseas Development (in the financial division of the European Development Fund) by virtue of a contract employing him as a member of the auxiliary staff (Category A), governed by the Conditions of Employment, which was entered into on 28 July 1964 but took effect as from 15 July 1964.

¹ — Translated from the French.

That contract was renewed regularly without interruption until on 1 October 1966 he was appointed, after a competition, as a probationary official in the Directorate-General for Overseas Development, in Grade A 4. He was established with effect from 1 April 1967. His period of service as a member of the auxiliary staff therefore lasted two years and two and a half months.

Mario Garilli, the applicant in Case 241/81, was engaged as a member of the auxiliary staff by virtue of a contract dated 13 August 1964, which took effect on 1 September 1964. His contract was also renewed without interruption until his appointment as a probationary official on 1 April 1967. He was established with effect from 1 January 1968. I shall return later to the matter of Mario Garilli's grade and duties; suffice it to say, at this stage, that his period of service as a member of the auxiliary staff was two years and seven months.

Both applicants argue essentially that the periods during which they served as members of the auxiliary staff should be regarded as periods of service performed by temporary staff for the purpose of calculating the years of service and years of pensionable service referred to in Article 77 of the Staff Regulations. As regards pension rights, the position of temporary staff is identical to that of established officials.

In return they offer to pay to the Community pension fund the contributions which they would have had to make during their periods as members of the auxiliary staff if they had been regarded as members of the temporary staff — which they maintain should have been the case after deduction of the contributions made to the local pension scheme for those periods, and to assign to the Commission any rights acquired under that scheme.

II — There is no particular problem in relation to the admissibility of the applications, which is not contested by the Commission. However, the complaints made by the applicants have been categorically rejected. I shall therefore now go on to consider the substance of the cases.

III — The background to the dispute is provided by the judgment of the Court (First Chamber) of 19 November 1981 in *Bernard Fournier v Commission of the European Communities*¹ and the earlier judgment of the Court (Second Chamber) of 1 February 1979 in *Fausta Desbormes v Commission of the European Communities*.²

In the latter case the Court "validated" for pension purposes a period of eight years and eleven months during which the applicant was employed, first as an "expert" and then as a member of the auxiliary staff, before she became an official.

The Court considered that the duties performed by the applicant were "permanent, definite, Community public service duties" from the outset (1961) and certainly from the date of her first appointment as a member of the auxiliary staff (1964), because the contracts concluded with the Commission were, for the calculation of years of pensionable service, to be regarded as contracts for the employment of a member of the temporary staff since the applicant "had been assigned to a permanent post appearing in the list of posts appended to the budget". It was not therefore necessary for the competent authority to have appointed the applicant *by express decision* to a permanent post appearing in the

1 — Case 106/80 (1981) ECR 2759.

2 — Case 17/78 (1979) ECR 189.

list of posts for the department in question and involving corresponding duties.

The Court ordered that the Commission was to "act accordingly in calculating the applicant's years of pensionable service" and the administrative departments concerned stated, in a notice dated 26 October 1979, that they were "prepared to examine the case of any official who, prior to appointment as an official, was employed as a member of the auxiliary staff".

That notice stated:

"Application by such officials with regard to their pension rights must, however, be supported by appropriate evidence so that the merits of each case may be examined, and in particular so that it may be determined, in accordance with the judgment of the Court in Case 17/78, whether:

- (i) the official concerned performed the same duties in the same department while a member of the auxiliary staff and after appointment, such duties having been defined by the Court as 'permanent, definite, Community public service duties', and that
- (ii) the duties performed corresponded to those of a permanent post appearing in the list of posts appended to the budget.

Evidence may take the form of a copy of any document, internal memorandum, or item of correspondence exchanged with the administrative or accounting departments or the department to which the person concerned was assigned."

The officials and other employees concerned were requested to use a form when submitting applications which contained, *inter alia*, the following question:

"During your period of employment as a member of the auxiliary staff did you occupy a permanent post included in the list of posts?

(If you answer Yes, you must submit all supporting documents)."

The Commission received a request under Article 90(1) of the Staff Regulations to regularize the position of the applicants and in the case of Armando Toledano Laredo acceded partially thereto.

It admitted that the similarity between the duties carried out before and after he was established gave rise to the presumption that, during the period of his employment as a member of the auxiliary staff commencing at the end of the first 12 months and immediately preceding his appointment as an official, he was performing "permanent, definite, Community public service duties" as defined in the judgment referred to and that his duties were not precarious, such as those which may legally be assigned to auxiliary staff by reason of the temporary absence of an official or by reason of their nature (duties which are transitory, urgent or ill defined). In those circumstances, it waived the requirement of proof of appointment to "a permanent post appearing in the list of posts appended to the budget."

On the other hand since the duration of a contract of a member of the auxiliary staff may, under the Conditions of Employment, extend to one year, the Commission maintains that the first 12 months of employment as a member of the auxiliary staff may not be taken into account, unless proof of inclusion in the list is furnished.

Thus, as regards Armando Toledano Laredo, the Commission accepted that, during the period from 5 October 1965 to 30 September 1966, he performed

practically the same duties as after his establishment. Yet it refused to take into account his first year as a member of the auxiliary staff (6 October 1964 to 5 October 1965) on the ground that there was no permanent post in the department involving duties corresponding to those performed by him as a member of the auxiliary staff.

As regards Mario Garilli, the Commission felt that he satisfied neither the requirements laid down by the Court in the *Deshormes* case nor the criteria determined by the Commission for the assimilation of periods of service performed as a member of the auxiliary staff to periods of service performed as a member of the temporary staff. Furthermore he was established in a category which was different from the one to which he had been appointed as a member of the auxiliary staff.

It is in the light of those developments that the remaining matters at issue must be examined.

1. The applicants maintain that it is in most cases impossible to prove the existence in the department in which an official is employed of a post appearing in the list of posts appended to the budget, in respect of which a vacancy notice should have been published before any appointment was made. It is sufficient if duties of the same type are performed by other employees who are members of the temporary staff or officials.

Put in such a categorical form, that argument would eliminate, with regard to social security, any distinction between "genuine" auxiliary staff, on the one hand, and temporary staff and officials on the other, a distinction which is clearly laid down in Articles 2 and 3 of the Conditions of Employment.

Article 52 of the Conditions of Employment restricts the employment of auxiliary staff to a maximum period of one year, except in the case of temporary replacement of an official, and Article 70 thereof provides that service performed by "genuine" auxiliary staff may not be taken into account for the purposes of a Community retirement pension.

From the social security point of view, a contract for the employment of auxiliary staff includes a provision pursuant to which the employee is affiliated to the compulsory social security scheme of the place where he works. He may, however, remain affiliated to the scheme in his country of origin or in the country to whose scheme he was last affiliated; in such a case the employing institution will be responsible for the employer's contributions, if affiliation is compulsory, or two-thirds of the employee's contributions where affiliation is voluntary.

It is, however, true that only the administration is in a position to know whether or not a person has, while employed as a member of the auxiliary staff, occupied a permanent position appearing in the list of posts. Only the administration has access to the internal records, which will not normally be available to officials — even less so to members of the auxiliary staff — and any attempt by the latter to have them produced in court is normally met by extreme reluctance on the part of the Commission.

It seems therefore that it is for the Commission, in a situation such as that in which the applicants find themselves, to show that during the period which commenced at the end of the first 12 months and immediately preceded their appointment as officials it was impossible to appoint them to permanent posts appearing in the list of posts appended to the budget, in view of the fact that

occupation of such a post is the criterion adopted in order to distinguish between auxiliary staff and temporary staff according to the judgments in the *Fournier* and *Deshormes* cases.

2. If the Commission does not produce such proof but acknowledges in some other manner that the duties undertaken during the period commencing at the end of the first 12 months and immediately preceding the appointment of the employee as an official are identical to the duties undertaken after such appointment, the presumption admitted by it in respect of the latter period should be extended to the *whole* of the period of service performed by the member of the auxiliary staff. The applicants maintain, apparently with certain justification, that the duties they performed during their initial period as members of the auxiliary staff were of the same nature as those performed during the second period and that, even after they had been appointed as officials, those duties continued to be entrusted to officials. As regards pension rights, the duties performed during the first period must be regarded as the same as those performed during the second period, since the applicants' employment at the Commission was without interruption.

3. That seems to me to be the case in relation both to Armando Toledano Laredo and to Mario Garilli.

The former performed the same duties both before and after the beginning of the period which the Commission now accepts may be taken into account for the calculation of pension rights.

As in the case of Armando Toledano Laredo, Mario Garilli was recruited as a scientific assistant.

In addition, and unlike the other applicant, Mario Garilli entered the service of the Commission after being placed equal third on the list of suitable candidates drawn up by the selection board after an *open competition* based on qualifications (No EEC 243/B). The notice of competition stated that the post to which it related was at that time vacant in the division dealing with general questions of commercial policy in the Commercial Policy (Negotiations) Directorate of the Directorate-General for External Relations.¹

Although it is true that his classification changed from Category B, in which he was recruited as a member of the auxiliary staff, to Category A when he was established and that he was assigned to the Directorate for Economic Structure and Development of the Directorate-General for Economic Affairs, the duties which Mario Garilli performed prior to his establishment, although involving a different level of responsibility, were certainly "permanent, definite, Community public service duties" within the meaning of the case-law of the Court.

In effect there was no difference between his duties as a *member of the auxiliary staff* in Division I/D/3, concerned with industrial questions (development of trade and safeguard clauses) in relation to Japan and Hong Kong, where he *assisted* an official in Grade A in the performance of his tasks, and those of the candidate appointed as a probationary *official*, in the capacity of *assistant*, on the basis of the list of suitable candidates drawn up following Open Competition No EEC 243/B.

After being appointed on 1 November 1964 to the section concerned with

1 — Journal Officiel of 23 January 1964, No 9, p. 118.

industrial questions (development of trade and safeguard clauses) in relation to Japan and Hong Kong, in the Commercial Policy Directorate of the Directorate-General for External Relations, that candidate was established in 1965 on completing his probationary period and it was only in 1968 that Mario Garilli was established, after taking part in a *further* competition (No 5155), enabling him to be transferred to Category A.

This shows, at least with regard to the applicants, that the distinctions laid down by the Commission for determining whether duties performed by a member of the auxiliary staff correspond to those performed by a member of the temporary staff or an official are not based on any specific criterion and give rise to discrimination.

4. According to the contract signed by Mario Garilli on 16 July 1965 (and likewise the contract signed by Armando Toledano Laredo on 3 August 1965) the appointment was for an *indefinite* period. That period lasted until 1 April 1967. Recourse to employment on that basis is improper according to the judgments in the *Desbormes* and *Fournier* cases.

In the draft directive submitted by the Commission to the Council on 7 May 1982 relating to temporary employment, the Commission itself defined (in Article 1 (d)) as a *permanent* employee any person who concludes a contract of indefinite duration with his employer. It considers that permanent employment

must be regarded as the normal situation, that it is appropriate to eliminate the misuse of temporary employment in the form of contracts for a fixed period and that permanent employees should be protected against improper recourse to such contracts. It is paradoxical that the Staff Regulations and the Conditions of Employment do not yet reflect the progress which has been made in the Member States.

The Commission has not been able to show that the applicants were recruited as auxiliary staff for the sole purpose of replacing officials or members of the temporary staff who were absent or unable to perform their duties or for the purpose of performing a task or service of an extraordinary or occasional nature. Furthermore it has not shown that the list of posts appended to the budget did not contain any vacant permanent post corresponding to the duties entrusted to the applicants, or that the duties undertaken by them throughout the long period of their employment as auxiliary staff did not merely vary in nature but actually differed from those which they went on to perform when they were appointed as officials, or finally that those duties were not subsequently taken over by other officials.

In those circumstances the employment relationship between the Commission and the applicants must be regarded as a single period of employment of indefinite duration. This is not affected by the fact that the employer is an institution governed by public law.

I conclude therefore with the recommendation that the Court's findings should be as follows:

All the contracts entered into by the Commission of the European Communities with Armando Toledano Laredo since 6 October 1964 and

with Mario Garilli since 1 September 1964 must be regarded as having been entered into with members of the temporary staff.

The Commission must act accordingly in calculating the applicants' years of service and years of pensionable service.

The Commission should be ordered to pay the costs.