

JUDGMENT OF THE COURT (FIRST CHAMBER)
17 MAY 1984¹

Paul Bähr
v Commission of the European Communities

(Official — Invalidity pension)

Case 12/83

Officials — Social Security — Insurance against accidents and occupational diseases — Invalidity — Initiation of the procedure to establish invalidity — Conditions
(Staff Regulations, Art. 78; Annex VIII, Art. 13)

Under Article 13 of Annex VIII which lays down, in accordance with Article 78 of the Staff Regulations, the conditions on which an official is entitled to an invalidity pension, the procedure to establish invalidity may be initiated only in relation to an official who is obliged to end his service with the Communities because he is suffering from an invalidity preventing him from performing his duties.

It follows that an official who has left the service several years ago and who suffers from an illness which would render him incapable of performing his duties if he were still in active employment is not entitled to request, on that ground alone, the initiation of the procedure to establish invalidity.

In Case 12/83

PAUL BÄHR, a former official of the Commission of the European Communities, residing in Brussels and represented by Dieter Rogalla, Rechtsanwalt registered with the Amtsgericht Steinfurt and the Landgericht Münster, with an address for service in Luxembourg at the Chambers of Tony Bieber, 83, Boulevard Grande-Duchesse-Charlotte,

applicant,

¹ — Language of the Case: German.

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jörn Pipkorn, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decision of 19 October 1982 refusing to initiate, in relation to the applicant, the procedure to establish invalidity with a view to awarding him an invalidity pension within the meaning of Article 78 of the Staff Regulations,

THE COURT (First Chamber)

composed of: Lord Mackenzie Stuart, President, T. Koopmans, President of Chamber, and G. Bosco, Judge,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

A — The applicable provisions

Article 47 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as “the Staff

Regulations”) provides that service is to be terminated by:

- (a) resignation;
- (b) compulsory resignation;
- (c) retirement in the interests of the service;
- (d) dismissal for incompetence;
- (e) removal from post;
- (f) retirement; or
- (g) death.

On 4 December 1972 the Council adopted Regulation (Euratom, ECSC, EEC) No 2530/72 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities (Official Journal, English Special Edition 1972 (1-8 December), p. 11). Article 2 of that regulation provided that until 30 June 1973 the institutions of the Communities were authorized to adopt, under certain conditions, for their officials in Grades A 1 to A 5 inclusive, measures terminating their service, as provided for in Article 47 of the Staff Regulations.

Under Article 3 (1) of that regulation, an official affected by a measure of that kind is entitled to a monthly allowance for a specific period which is to cease in any event when he reaches the age of 65. During the period for which he is entitled to receive the allowance the official is to continue, in accordance with Article 3 (7) of the regulation, to acquire further rights to retirement pension based on the salary attaching to his grade and step, provided *inter alia* that he pays the contribution provided for in the Staff Regulations during that period.

According to Article 78 of the Staff Regulations, an official is to be entitled, in the manner provided for in Articles 13 to 16 of Annex VIII, to an invalidity pension in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket.

The first paragraph of Article 13 of Annex VIII is as follows:

“Subject to the provisions of Article 1 (1), an official aged less than 65 years who at any time during the period in which he is acquiring pension rights is

recognized by the Invalidity Committee to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who is obliged on these grounds to end his service with the Communities shall be entitled, for so long as such incapacity persists, to invalidity pension as provided for in Article 78 of the Staff Regulations.”

B — Background

The applicant, Paul Bähr, who was born in 1926, entered the service of the Commission on 1 January 1959 as an official and performed his duties until 30 June 1973. His last post was that of Principal Administrator in Grade A 4 in the Spokesman's Group of the Commission.

On the accession of three new Member States in 1973, the applicant requested the Commission by letter of 23 February 1973 to apply in relation to him a measure terminating his service, as provided for by Article 2 of Regulation No 2530/72. That measure was applied in relation to the applicant as from 1 July 1973. Accordingly, he received the allowance provided for by that regulation until 31 October 1982. During that period he continued to pay contributions, in accordance with Article 3 (7) of that regulation in order to acquire pension rights. Since 1 November 1982 the applicant has been in receipt of a retirement pension.

By letter of 27 July 1981 the applicant requested the Commission to initiate the procedure to establish invalidity, in accordance with Article 78 of the Staff Regulations, in view of the state of his health. He based his request on the fact that in 1967 he had suffered a cardiac infarction owing to the excessive workload and that the attack was

certified by a doctor. In 1980 he suffered a further infarction and has since then been unfit for work and in need of constant medical attention. In his view, therefore, the Commission should have referred the matter to the Invalidity Committee for a decision recognizing his invalidity.

By decision of 7 September 1981 the Commission notified the applicant that the procedure in question could no longer be set in motion since he had left the service of the Communities on 1 July 1973. In those circumstances he no longer fulfilled the conditions set out in Article 13 of Annex VIII to the Staff Regulations.

In reply to the complaint lodged by the applicant on 21 May 1982, the Commission informed him on 19 October 1982 that it could not accede to his request essentially for the same reasons as those already given in its decision of 7 September 1981.

C — *Written procedure*

By application lodged at the Court Registry on 21 January 1983 the applicant sought the annulment of the Commission decision refusing to initiate, in relation to him, the procedure to establish invalidity provided for by Article 59 of the Staff Regulations.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul the Commission decision of 19 October 1982;

2. Award the applicant, by reason of an invalidity which arose in the course of the performance of his duties, a pension amounting to 70 % of his basic salary, with effect from 1 July 1973, or, in the alternative, from 10 February 1980;
3. In the alternative, order the Commission to initiate the appropriate procedures under the Staff Regulations with a view to awarding the applicant, by reason of an invalidity arising in the course of the performance of his duties, a pension amounting to 70 % of his basic salary, with effect from 1 July 1973, or, in the alternative, from 10 February 1980;
4. Order the defendant to pay the costs.

The *Commission*, the *defendant*, contends that the Court should:

1. Dismiss the application under 2. above as inadmissible;
2. Dismiss the application under 3. above as inadmissible inasmuch as the applicant seeks the initiation of the procedure to establish invalidity with effect from a date prior to 10 February 1980;
3. Dismiss the remainder of the application as unfounded;
4. In the alternative, dismiss the application in its entirety as unfounded;
5. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

In support of his claims, the *applicant* contends in the first place that his invalidity should have been recognized even before the application of Regulation No 2530/72. He had already been seriously ill for a number of years following a cardiac infarction in 1967.

A certificate establishing the precarious state of his health was issued by his doctor and forwarded at the time to the administration of the Commission. According to the applicant, it follows that in the course of discussions concerning the application of Regulation No 2530/72 the Commission should, in accordance with its duty of assistance, automatically have considered initiating the procedure to establish invalidity under Article 78 of the Staff Regulations. The medical branch of the Commission, whose duties under the Staff Regulations include the carrying out of an annual medical check-up on officials, should have established on that occasion that the applicant was unfit for work. However, the state of his health passed unnoticed at the time as a result of the defendant's failure to provide him with the necessary assistance.

therefore considers that the defendant's decision of 19 October 1982 is based on an incorrect interpretation of the provisions of Regulation No 2530/72 and of Article 13 of Annex VIII to the Staff Regulations.

The *Commission of the European Communities*, the *defendant*, points out first of all that in his complaint through official channels the applicant asked merely that a procedure should be initiated to establish his invalidity. In his application to the Court, the applicant is pursuing a different aim inasmuch as he seeks primarily recognition of his right to an invalidity pension with effect from 1 July 1973. That claim, submitted for the first time in the application initiating these proceedings, is manifestly inadmissible on the ground that it is contrary to Article 91 of the Staff Regulations.

Next, the applicant contends that the defendant should have initiated the procedure to establish invalidity during the period in which he received the allowances provided for by Regulation No 2530/72. During that period he suffered a second infarction on 9 February 1980. Since then he has been totally unfit for work. The applicant contends that in view of his condition, the defendant should have applied the relevant provisions of the Staff Regulations. Article 13 of Annex VIII to the Staff Regulations provides that officials aged less than 65 years who are no longer in active employment may also be recognized to be suffering from permanent invalidity as long as they continue to acquire pension rights. That is the position in this case. The applicant adds that the reference to pension rights in Regulation No 2530/72 indicates that those to whom the regulation applies enjoy all the rights and are subject to all the obligations arising in a comparable situation in relation to officials who are still in active employment. The applicant

The Commission takes the same view of the applicant's alternative claim, in so far as he seeks the initiation of the procedure to establish invalidity with retroactive effect from 1 July 1973. That claim for retroactivity was not put forward in the complaint through official channels and must therefore be regarded as inadmissible, particularly as the applicant himself stated in his complaint of 21 May 1982 that he had been "unfit for work" since 9 February 1980. In that connection, the Commission adds that in his complaint through official channels the applicant did not argue that the Commission had failed to discharge its duty by refraining from initiating the procedure to establish invalidity before 1 July 1973. It follows that the arguments put forward by the applicant which relate to the circumstances prevailing prior to that date should not be taken into account.

In the light of those observations, the Commission considers that only the

claim for the initiation of the procedure to establish invalidity on the basis of the applicant's unfitness for work since 9 February 1980 is admissible.

As regards the question whether the application is well-founded, the Commission maintains that only officials possessing a status provided for by Article 35 of the Staff Regulations may apply for the award of an invalidity pension. In support of that argument, it refers to Article 13 of Annex VIII which is based on the idea that an official suffering from total permanent invalidity is obliged on that ground to end his service with the Communities. Article 13 thus establishes a causal connection between establishment of invalidity and termination of service. The applicant however had already left the service following the application of Regulation No 2530/72. Accordingly since 1973 he has no longer been able to fulfil the conditions laid down by Article 13 or, therefore, acquire a right to an invalidity pension.

In the Commission's view the applicant is wrong to consider that the fact that

Article 13 of Annex VIII to the Staff Regulations applies to an official during the period in which he is acquiring pension rights operates in his favour. That criterion does not permit the category of officials who may be awarded an invalidity pension to be extended to persons who, according to Article 47 of the Staff Regulation, are no longer officials.

Finally, the Commission contends that the duty of assistance relied upon by the applicant is of no relevance in this case. That duty undoubtedly requires an institution to ensure that an official may assert the rights vested in him by the Staff Regulations but its effect cannot be to enable the official to acquire a pension not provided for by the Staff Regulations.

IV — Oral procedure

Oral argument was presented by the parties at the sitting on 9 February 1984.

The Advocate General delivered his opinion at the sitting on 22 March 1984.

Decision

- 1 By application lodged at the Court Registry on 21 January 1983, Paul Bähr, a former official of the Commission of the European Communities, brought an action for the annulment of the Commission decision of 19 October 1982 refusing to award the applicant an invalidity pension and for an order to the Commission to award him an invalidity pension with effect from 1 July 1973 or, in the alternative, from 10 February 1980.
- 2 The applicant, who entered the service of the Commission on 1 January 1959 as an official, performed his duties until 30 June 1973, his last post being that of Principal Administrator in Grade A 4. At his request, the Commission

applied in relation to him a measure terminating his service with effect from 1 July 1973, pursuant to Regulation (Euratom, ECSC, EEC) No 2530/72 of the Council of 4 December 1972 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities (Official Journal, English Special Edition 1972 (1-8 December), p. 11).

- 3 On leaving the service, the applicant received until 31 October 1982 the allowance provided for by Regulation No 2530/72. With effect from 1 November 1982 he received a retirement pension. However, he considers that he is entitled to an invalidity pension as from the date of termination of service or in any event as from 10. February 1980, the date on which he suffered a cardiac infarction which rendered him unfit for work.
- 4 In that connection, the applicant maintains first of all that in 1967 he suffered his first infarction which, according to a certificate issued by his doctor on 24 March 1967, was attributable to overwork and henceforth prevented him from undertaking a heavy workload. In those circumstances the Commission was under an obligation to consider, in the course of discussions relating to the application of Regulation No 2530/72, the initiation of a procedure to establish invalidity under Article 78 of the Staff Regulations. By taking no action at the time, the Commission failed to discharge duty of assistance in relation to its officials.
- 5 Next, the applicant maintains that a second infarction in 1980 rendered him unfit for work in view of the highly precarious state of his health since that time. It is therefore indisputable, in his view, that at the time his status was that of an official aged less than 65 years suffering from permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket and that status, according to Article 13 of Annex VIII to the Staff Regulations, entitled him to the award of an invalidity pension if such invalidity arose during the period in which he was acquiring pension rights. The applicant claims to have fulfilled the latter condition inasmuch as he continued, in accordance with Article 3 (7) of Regulation No 2530/72, to pay contributions in order to acquire pension rights.

- 6 Since the Commission refused to refer the matter to the Invalidity Committee at the request of the applicant, the latter lodged a complaint against such refusal. Following the rejection of that complaint, the applicant brought this action before the Court.

- 7 The Commission contends that the application is inadmissible inasmuch as the applicant seeks the award of an invalidity pension, since entitlement to such a pension may be recognized only by the Invalidity Committee, as is clear from Article 13 of Annex VIII to the Staff Regulations. Since the objection of inadmissibility is devoid of purpose if the application for annulment is dismissed, the substance must first be considered.

- 8 The Commission does not contest the facts as outlined by the applicant but it considers that the provisions of the Staff Regulations themselves preclude the award to him of an invalidity pension.

- 9 The Commission emphasizes in the first place that the applicant did not request that the matter be referred to the Invalidity Committee either in 1967 when he suffered his first infarction or in 1973 when he left the service. On the other hand the applicant returned to work after his illness in 1967 and continued to perform his duties until 1973 when, at his own request, Regulation No 2530/72 was applied to him. Accordingly, there was no reason for the Commission to refer the matter to the Invalidity Committee.

- 10 Next, the Commission contends that the provisions of the Staff Regulations are based on the idea expressed in Article 53 that an official who is recognized by the Invalidity Committee to be suffering from total invalidity is to cease to perform his duties and is to be retired. The procedure to establish invalidity cannot therefore be applied to an official who has already ceased to perform his duties. The same idea is expressed in Article 13 of Annex VIII — a provision on which the applicant's arguments are based — inasmuch as the invalidity pension provided for therein is awarded by the Invalidity Committee only to an official who is suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who "is obliged on these grounds to end his service" with the Communities.

- 11 For the purposes of the application to the present case of Article 13 of Annex VIII, a distinction must be drawn between the two arguments adduced by the applicant which are that the matter should have been referred to the Invalidity Committee when he left the service in 1973 and that the matter should have been referred to the Invalidity Committee after his second heart attack in 1980.
- 12 As regards the latter case, the Commission's reasoning must be accepted. It follows from the unequivocal provisions of Article 13 of Annex VIII which lays down, in accordance with Article 78 of the Staff Regulations, the conditions on which an official is entitled to an invalidity pension, that the procedure to establish invalidity may be initiated only in relation to an official who is obliged to end his service with the Communities because he is suffering from an invalidity preventing him from performing his duties.
- 13 It follows that an official who has left the service several years ago and who suffers from an illness which would render him incapable of performing his duties if he were still in active employment is not entitled to request, on that ground alone, the initiation of the procedure to establish invalidity.
- 14 That finding cannot, however, resolve the other problem raised in this dispute, namely whether the Commission failed to discharge an obligation towards a former official suffering from total permanent invalidity, inasmuch as it did not refer the matter to the Invalidity Committee at the time at which the applicant evinced the intention of leaving the service. It is common ground that, at the time, the applicant had already suffered a first cardiac infarction. Experience shows that the risk of suffering a second heart attack is considerably greater after such an event.
- 15 In that situation, it was for the Commission to determine whether the state of the applicant's health at the time at which he expressed the intention of leaving the service was such that he could have continued to perform his duties if he had chosen not to end his service with the Communities.
- 16 However, circumstances of that kind may be taken into account in connection with the review of the legality of the contested decision only if it

is established that there is a direct and immediate connection between the official's ultimate invalidity and the state of his health when he left the service. That connection cannot be deduced simply from the fact that the official suffered two consecutive heart attacks particularly where, as in this case, they are separated by more than 10 years.

- 17 It was for the applicant to justify such a connection which has not, however, been established.
- 18 In those circumstances, the application must be dismissed.

Costs

- 19 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions by employees of the Communities are to be borne by those institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the parties to bear their own costs.**

Mackenzie Stuart

Koopmans

Bosco

Delivered in open court in Luxembourg on 17 May 1984.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the First Chamber