JUDGMENT OF THE COURT (First Chamber)
23 January 1986 *

In Case 171/84

Pietro Soma and 17 other applicants, members of the temporary staff of the Commission of the European Communities assigned to the Joint Nuclear Research Centre, Ispra, represented by G. Marchesini, advocate at the Corte di cassazione [Supreme Court of Cassation] of the Italian Republic, with an address for service in Luxembourg at the Chambers of V. Biel, of the Luxembourg Bar, 18A rue des Glacis,

applicants,

v

Commission of the European Communities, represented by G. Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the Chambers of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION requesting the Court to declare void the measure whereby the Commission, in calculating the applicants' pension rights under the Community scheme, took only partial account of their period of service with the Commission before they were appointed as members of the temporary staff,

THE COURT (First Chamber)

composed of: Lord Mackenzie Stuart, President, G. Bosco and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 24 October 1985,

gives the following

* Language of the Case: Italian.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 28 June 1984, Mr Pietro Soma and 17 other applicants, members of the temporary staff of the Commission assigned to the Joint Nuclear Research Centre, Ispra, instituted proceedings requesting the Court to declare void the decisions whereby the Commission, in calculating the applicants' pension rights under the Community scheme, took only partial account of their period of service with the Commission before they were appointed as members of the temporary staff.

2 It is clear from the documents before the Court that, until the entry into force on 1 November 1976 of Council Regulation (ECSC, EEC, Euratom) No 2615/76 of 21 October 1976 amending Regulation (EEC, Euratom, ECSC) No 259/68 as regards the conditions of employment of other servants of the European Communities (Official Journal 1976, L 299, p. 1), the applicants were employed as members of the establishment staff at the Joint Nuclear Research Centre, Ispra, and that, in that capacity, they were affiliated to the Italian social security scheme administered by the Istituto nazionale della previdenza sociale [National Social Welfare Institution, hereinafter referred to as 'the INPS'].

3 As a result of the adoption of Council Regulation No 2615/76, the category of establishment staff was abolished and the applicants acquired the status of temporary staff under Article 2 of the Conditions of Employment of Other Servants (hereinafter referred to as 'the Conditions of Employment'), henceforth supplemented by a further subparagraph containing a new category defined as follows: '(d) Staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned'.

4 Moreover, Regulation No 2615/76 provided for the affiliation of former establishment staff to the Community pension scheme by amending Article 39 (2) of the

Conditions of Employment, which now reads as follows: 'On leaving the service, a servant within the meaning of Article 2 (c) or (d) shall be entitled to a retirement pension or severance grant as provided for in Title V, Chapter 3 of the Staff Regulations and Annex VIII to the Staff Regulations'.

5 The first subparagraph of Article 2 (4) of Regulation No 2615/76, which is a transitional provision, states that, in the case of establishment staff who have acquired the status of temporary staff, the years of service completed as establishment staff are to be taken into account for the purposes of the application of the first paragraph of Article 77 of the Staff Regulations, which provides that entitlement to a retirement pension is subject to completion of at least 10 years' service.

6 However, according to the second subparagraph of Article 2 (4) of Regulation No 2615/76, only the years of service completed by former establishment staff in their new capacity as temporary staff are to be taken into account for the purpose of calculating the number of years of pensionable service within the meaning of Article 2 of Annex VIII to the Staff Regulations.

7 On grounds of fairness, the Commission none the less decided to apply by analogy to former members of the establishment staff, at their request, the provisions of Article 11 (2) of Annex VIII to the Staff Regulations, which enable an official who has entered the service of a Community institution after being affiliated to a national social security scheme to transfer to the Communities the actuarial equivalent of the retirement pension rights acquired by him under the national scheme. In such a case, the institution in which the official serves is to determine, taking into account his grade on establishment, the number of years of pensionable service with which he is to be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent.

8 On 13 July 1978, the Commission circulated a notice at the Joint Research Centre, Ispra, which had already been published in Staff Courrier No 391 of 14 June 1978, informing temporary staff previously affiliated to the INPS that they could transfer their pension rights to the Community scheme as a result of the agreement concluded in Rome on 2 March 1978 between the INPS and the Community.

9 On 2 February 1983 Mr Soma, who had been a member of the temporary staff since 1 November 1976 by virtue of Council Regulation No 2615/76, applied to the Commission in order to avail himself of that possibility for the period in which he had been employed as a member of the temporary staff at the Joint Nuclear Research Centre, Ispra, namely the period from 1 March 1961 to 31 October 1976.

10 On 4 October 1983 the Commission informed Mr Soma that, as a result of the calculation which it had carried out on the basis of Article 11 (2) of Annex VIII to the Staff Regulations, the length of service completed as a member of the establishment staff which could be taken into account for the computation of his Community pension totalled six years, two months and 23 days.

11 According to the notices received by the other applicants, on average only one-third of the number of years completed by them as members of the establishment staff could be taken into account for the calculation of their Community pension.

12 Taking the view that the calculations set out in the decisions notified to them by the Commission were unfair, Mr Soma and the other applicants lodged formal complaints in December 1983 on the basis of Article 46 of the Conditions of Employment in which they sought the annulment of the measures adopted.

13 By decisions notified to the applicants in March 1984, the Commission rejected those complaints on the ground that they were identical to the complaints which were submitted in 1981 by Mrs Celant and other officials and which it had rejected. In that regard, the Commission pointed out that the position which it had adopted in 1981 was upheld by the Court in its judgment of 6 October 1983 in Joined Cases 118 to 123/82 (*Celant* v *Commission* [1983] ECR 2995).

14 Since they were dissatisfied with the Commission's attitude towards them, Mr Soma and 17 other applicants instituted these proceedings on 25 June 1984. In their applications, they request the Court to declare void the decisions whereby the Commission took account, for the purposes of the computation of the Community retirement pension, of the pension rights acquired by the applicants prior to their appointment as members of the temporary staff and to hold that they are entitled to be credited with a longer period of pensionable service than that taken into account in the event of transfer of the actuarial equivalent. The applicants also seek a declaration that the Commission is under an obligation to guarantee their right to choose between transfer of the actuarial equivalent and transfer of the sums repaid to them from the pension scheme to which they were previously affiliated by preparing calculations showing the amount involved in each case.

15 In support of their applications, the applicants contend in the first place that the Commission has infringed Article 11 (2) of Annex VIII to the Staff Regulations, which confers on the person concerned an option to transfer to the Community pension fund, with a view to benefiting in the future from a single pension scheme, either the actuarial equivalent of retirement pension rights acquired under the national social security scheme or the sums repaid therefrom.

16 In that regard they emphasize that the calculations carried out by the Commission on the basis of Article 11 (2) of Annex VIII relate exclusively to the actuarial equivalent and contain no indication whatsoever of the length of pensionable service that would result from a calculation based on the transfer of the sums repaid. That omission on the part of the Commission prevented them from exercising in full knowledge of the facts the option which is provided for by Article 11 (2) of Annex VIII; in its judgment of 18 March 1982 in Case 212/81 (*Caisse de Pension des Employés Privés* v *Bodson* [1982] ECR 1019) the Court confirmed that that option existed, regardless of the fact that national schemes applied only one procedure or the other.

17 In reply, the Commission states that the option provided for by Article 11 (2) of Annex VIII is not as absolute as the applicants maintain. Its obligation to allow the exercise of that option must be assessed in the light of the circumstances prevailing in the State concerned. Only if there is such an option in that State is the Commission under an obligation to allow those concerned to exercise it following the conclusion of an appropriate agreement between the Community and the relevant national social security institution.

18 The Commission states that in this case it was unable to offer to calculate the applicants' pension rights on the basis of the transfer of the sums repaid to them, since that procedure is not provided for in the agreement entered into on 2 March 1978 between the Community and the INPS. In its view, the applicants' interpretation of the judgment of 18 March 1982 in the *Bodson* case is incorrect since in that judgment the Court merely defined the expressions 'actuarial equivalent' and 'sums repaid'.

19 It must also be pointed out that the applicants referred during the proceedings to Italian Law No 29 of 7 February 1979 which, they claim, introduced new provisions allowing for the transfer of sums repaid from pension funds.

20 In view of the arguments put forward by the applicants, it appears to the Court that it is necessary to determine the precise scope of Article 11 (2) of Annex VIII. An analysis of the wording of that article clearly reveals that its fundamental purpose is to ensure the transition from a national insurance scheme to the Community scheme by one of the two procedures to which it refers, that is to say transfer of the actuarial equivalent or transfer of the sums repaid; it does not, however, require that both procedures should be provided for, whether or not they exist under national law.

21 Moreover, it must be emphasized, as the Commission has rightly observed, that the Court, in its judgment of 18 March 1982 in the *Bodson* case, merely defined the expressions 'actuarial equivalent' and 'sums repaid' and did not rule on the question whether Article 11 (2) of Annex VIII required the Commission to offer those concerned a choice between transfer of the actuarial equivalent and transfer of the sums repaid.

22 In this case, it should be noted that, at the time of the conclusion of the agreement of 2 March 1978 between the Community and the INPS, Italian law made no provision for the transfer of sums repaid by a pension fund. It was therefore impossible for the parties to that agreement to incorporate that method of transfer in the agreement, which, for that reason, provides solely for the transfer of the actuarial equivalent. That being so, it would appear that no purpose would be served by ascertaining whether Italian Law No 29 of 7 February 1979, which the applicant relied upon at the hearing, did in fact introduce new provisions allowing for the transfer of sums repaid from pension funds.

23 It follows from the foregoing considerations that the applicants' first submission cannot be accepted as it is based on an erroneous interpretation of Article 11 (2) of Annex VIII.

24 In support of their claims, the applicants put forward a second complaint based on a breach of the principle of non-discrimination. The contend that, although the funds accumulated for the purposes of their pension are of equal or greater amount, their pension rights are greatly inferior to those of other officials and temporary servants recruited as such on entering the service. In the calculation which it carried out, the Commission credited the applicants with a period of

pensionable service which is a mere third of the period credited to officials and temporary servants who have paid similar contributions to the Community pension fund since they entered the service.

25 In that regard the Commission observes that, since all pension schemes are different as regards the nature of the contributions and the period of payment, the age of retirement and the amount of the pension, a uniform filter is needed in order to transform the rights acquired under a given pension scheme into years of pensionable service within the meaning of the Staff Regulations.

26 The Commission maintains that that uniform filter, which takes the form of a single mathematical formula devised by the Commission pursuant to Article 11 (2) of Annex VIII, seeks merely to guarantee equal treatment for officials and temporary servants, whatever their background. The unequal result which the calculation in question seems to produce is only apparent because, in any event, the amount of the Community pension is much greater than that of the INPS pension. Furthermore, the Commission refers to the Court's judgment of 6 October 1983 in the *Celant* case and, in particular, to paragraph 28 thereof, in which the Court upheld the Commission's view that the payment of equivalent contributions does not necessarily lead to an equivalent number of years of pensionable service being taken into account.

27 In order to determine whether the applicants' second submission is well founded, the Court considered it necessary to put two questions to the Commission. In the first place, it asked the Commission to explain in greater detail why the differences between the two pension schemes, which had made it necessary to apply the mathematical formula in this case, had led to the result which was contested by the applicants and, secondly, to state the reasons why the Commission considered that in their second submission the applicants were concerned exclusively with the retroactive recognition of pension rights which would have accrued to them under the Community scheme if they had been employed as temporary servants from the outset.

28 In its reply to the Court on 30 April 1985, the Commission emphasized, in the first place, that the variable factors in the mathematical formula used for the calculation of the Community pension were very numerous and were more closely connected with the personal background of those concerned, in particular their age, than with the contributions paid, and secondly that the aim pursued by the applicants was to ensure that the Commission took account, for the computation of their

Community pension, of a number of years of pensionable service equal to the number of such years completed under the national scheme.

29 In the light of the foregoing, it would appear at first sight that, if a comparison is made between the position of a member of the local staff who does not acquire the status of temporary servant until later and the position of a member of staff who acquires that status on entering the service, where over a given period they pay virtually identical contributions to the Italian social security scheme and to the Community scheme respectively, the temporary servant is, from the date on which he enters the service, in a more favourable position in view of the fact that, for the purposes of the calculation of his retirement pension, he is credited with the full number of years of service which he has completed. It is that difference in treatment which the applicants consider to be discriminatory.

30 However, according to the consistent case-law of the Court, 'it is not possible to question the differences in status between the various categories of persons employed by the Communities' and 'the fact that some categories of persons employed by the Communities may enjoy guarantees under the Staff Regulations and social security benefits which are not given to other categories cannot, therefore, be regarded as discrimination' (paragraph 22 of the judgment of 6 October 1983 in *Celant*).

31 Moreover, the Court clearly emphasized in paragraph 27 of that judgment that the Community legislature cannot be reproached for failing in 1976 to transform establishment staff into temporary staff retroactively, particularly as regards affiliation to the Community pension scheme, and that 'the only machinery compatible with sound financial management of the Community pension scheme in the event of retroactive recognition of periods of insurance is the application of Article 11 of Annex VIII to the Staff Regulations'.

32 Moreover, as regards cases in which the calculation of the Community pension is based on the transfer of the actuarial equivalent, as is permitted by Article 11 (2) of Annex VIII, the Court has expressly declared that, 'since the establishment of the actuarial equivalent by the original social security institution and its re-

assessment on the basis of the rules applicable under the Community's pension scheme are based on different particulars and considerations regarding the history of those concerned, their future prospects, the amount of contributions and the nature and amount of benefits, it does not seem abnormal that the determination of the years of pensionable service to be taken into account for the Community pension leads to a different figure from the years of pensionable service taken into account by the national institution'.

33 It is therefore apparent that the legal position of the applicants with regard to the calculation of the Community pension is in no way comparable to that of members of staff who acquired the status of temporary servants on entering the service. Consequently, the applicants cannot have suffered discrimination. Their second submission must therefore be rejected.

34 Further, the applicants complain that the Commission took into consideration not only the basic salary applicable in October 1976 but also the weighting provided for in Article 65 of the Staff Regulations (amounting to 157.8% at the time) in the mathematical formula which it used for calculating the number of years of pensionable service to be taken into account for the computation of the Community pension. They maintain that the application of that weighting had the effect, in the first place, of significantly reducing the period of pensionable service, inasmuch as the coefficient and the basic salary form part of the denominator in the mathematical formula applied by the Commission, and secondly of discriminating against the applicants in favour of members of staff who have enjoyed the status of temporary servants since entering the service, inasmuch as the contributions paid to the pension scheme by temporary servants were calculated solely on the basis of the basic salary which they were receiving at the time.

35 In reply, the Commission refers to the Court's judgment of 19 November 1981 in Case 194/80 (*Benassi* v *Commission* [1981] ECR 2815) and states that the Court accepted the application of the weighting in connection with calculations carried out pursuant to Article 11 (2) of Annex VIII; it maintains that it was necessary to apply the weighting in this case in order to avoid distorted results. Moreover, it observes that the different treatment which it accorded to the applicants was not discriminatory, since their legal position is different from that of members of staff who have enjoyed the status of temporary servants since their entry into the service.

36 For the reasons stated by the Commission, the Court considers that this submission, which the applicants did not pursue in their reply but to which they returned during the oral procedure, must be rejected.

37 The applicants' final complaint against the Commission is that the latter deducted interest at the rate of 3.5% from the capital sum transferred by the INPS in respect of the period between 1 November 1976 and the date of the actual transfer, without providing any justification whatsoever for the deduction. As a result of that deduction, therefore, the capital sum transferred was substantially diminished, particularly since the Commission did not give the applicants an opportunity to decide whether to transfer that sum until 1983, that is to say long after their appointment as members of the temporary staff. The applicants maintain that, as a result of that breach of its duty to inform and to protect its employees, the Commission failed to provide them with all the information required in order to enable them to take their decision in full knowledge of the facts.

38 In that regard, the Commission replies that the applicants could have found all the necessary information concerning the 3.5% interest in the agreement of 2 March 1978 between the Commission and the INPS. It observes that the charging of such interest, which relates to the period from 1 November 1976, the date on which the applicants were appointed as temporary servants, to the date of the proposed transfer of the capital accumulated by the INPS, is justified by the fact that, until the capital is transferred, no interest thereon can accrue to the Commission. Moreover, the deduction of interest is offset by the fact that the INPS increases the capital sum transferred by interest calculated at the rate of 4.5% from 1 November 1976 until the date on which the Commission requests it to specify the exact amount that is to be transferred. Furthermore, the agreement of 2 March 1978 stipulates that not more than 90 days may elapse between the date of that request and the actual transfer.

39 It is clear from the documents before the Court that it was only during that period of 90 days that the applicants were debited with interest at 3.5% without being credited with interest at 4.5%. Moreover, it must be emphasized that the applicants were credited with interest by the INPS from the date of their appointment as members of the temporary staff until the date on which the Commission requested the INPS to transfer the sums in question. In view of the difference between the rates at which interest was debited and credited, it would appear that, as regards the period commencing in 1976 and ending in 1983, the delays in the implementation of the procedure for transferring capitalized pension rights were in no way detrimental to the applicants but in fact operated to their

advantage. Moreover, the applicants do not dispute that the Commission dispatched a number of experts to Ispra who were entrusted with the task of providing the staff concerned with all the necessary information concerning the application of Article 11 of Annex VIII. The Commission therefore gave the applicants an opportunity to acquaint themselves with the details and to seek clarification on any points which seemed ambiguous or obscure to them. Accordingly, the applicants' fourth submission cannot be accepted.

40 Since the applicants have not been successful in any of their submissions, the applications must be dismissed.

Costs

41 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, in proceedings brought by servants of the Communities, institutions are to bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Dismisses the applications;

(2) Orders the parties to bear their own costs.

Mackenzie Stuart Bosco O'Higgins

Delivered in open court in Luxembourg on 23 January 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President