

JUDGMENT OF THE COURT (Fourth Chamber)

25 May 2000 \*

In Case C-82/98 P,

Max Kögler, a former official of the Court of Justice of the European Communities, resident at Konz, Germany, represented by T. Baltes, of the Trier Bar, with an address for service in Luxembourg at the Chambers of R. Weber, 3 Rue de la Loge,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities (Third Chamber) of 20 January 1998 in Case T-160/96 *Kögler v Court of Justice* [1998] ECR-SC I-A-15 and II-35, seeking to have that order set aside,

the other party to the proceedings being:

Court of Justice of the European Communities, represented by T. Millett, Legal Adviser for Administrative Affairs, acting as Agent, with an address for service in Luxembourg at the Court of Justice, Kirchberg,

defendant at first instance,

\* Language of the case: German.

and

**Council of the European Union**, represented by M. Bauer and D. Canga Fano, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Legal Affairs Department of the European Investment Bank, 100 Boulevard Konrad Adenauer,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of: D.A.O. Edward, President of the Chamber, A. La Pergola and H. Ragnemalm (Rapporteur),

Judges, Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar, and subsequently R. Grass, Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 June 1999, at which Mr. Kögler was represented by T. Baltes, the Court of Justice by B. Zimmerman, Lawyer-linguist, acting as Agent, and the Council by M. Bauer,

having regard to the order of 25 October 1999 reopening the hearing,

having regard to the Report for the Hearing,

having regard to the parties' waiver of a fresh hearing,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2000,

gives the following

### Judgment

- 1 By application lodged at the Registry of the Court on 26 March 1998, Mr Max Kögler (hereinafter 'the appellant') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the order of the Court of First Instance of 20 January 1998 in Case T-160/96 *Kögler v Court of Justice* [1998] ECR-SC I-A-15 and II-35 (hereinafter 'the contested order'), in which the Court of First Instance declared manifestly inadmissible his action for, *inter alia*, annulment of the decision of the Complaints Committee of the Court of Justice of 1 July 1996 dismissing his application for the weightings based on the cost of living in Berlin to be applied on the re-calculation and final assessment of his pension for the period 1 July 1991 to 30 June 1994.

## Legal background and facts of the dispute

2 The legal background and the facts giving rise to the dispute are set out in the contested order as follows:

‘1 The applicant is a former Director of the Translation Directorate of the Court of Justice of the European Communities who was retired with effect from 1 December 1987. Following his retirement he has always lived in Konz, in Germany.

2 Under Article 82(1) of the Staff Regulations of Officials of the European Communities (hereinafter “the Staff Regulations”), the pensions of former officials are to be weighted at the rate fixed for the country where the recipient proves he has his residence.

3 After Germany was reunified, Berlin became the capital of Germany in October 1990.

4 In Case T-536/93 *Benzler v Commission* [1994] ECR-SC II-777 and Case T-64/92 *Chavane de Dalmassy and Others v Commission* [1994] ECR-SC II-723 the Court of First Instance held that Article 6(2) of, first, Council Regulation (EEC, ECSC, Euratom) No 3834/91 of 19 December 1991 adapting, with effect from 1 July 1991, the remuneration and pensions of officials and other servants of the European Communities and the weightings affecting that remuneration and those pensions (OJ 1991 L 361, p. 13) and, secondly, Council Regulation (EEC, ECSC, Euratom) No 3761/92 of 21 December 1992 adapting, with effect from 1 July 1992, the remuneration and pensions of officials and other servants of the European Communities and the weightings affecting that remuneration and those pensions (OJ 1992 L 383, p. 1), in so far as they fixed a provisional weighting for Germany on

the basis of the cost of living in Bonn, infringed the principle set out in Annex XI to the Staff Regulations that the weighting for each Member State should be fixed by reference to the cost of living in its capital, since Berlin had been the capital of Germany since 3 October 1990. Accordingly the Court annulled the applicants' pay and pension slips in those cases as based on those regulations.

- 5 The weightings, described in a footnote in the abovementioned regulations as "provisional figure" or stated to be applicable "without prejudice to the decisions which the Council may be required to adopt following a proposal from the Commission", were not subsequently amended.
  
- 6 Following the judgments referred to above, several meetings were held within the Council to determine the measures to be adopted in execution thereof. Then, on 19 December 1994, the Council adopted Regulation (ECSC, EC, Euratom) No 3161/94 adapting, as from 1 July 1994, the remuneration and pensions of officials and other servants of the European Communities and the weightings applying to that remuneration and those pensions (OJ 1994 L 335, p. 1). Article 6(1) of that regulation provides, with effect from 1 July 1994, for a general weighting for Germany based for the first time on Berlin and also for special weightings for Bonn, Karlsruhe and Munich.
  
- 7 Subsequently, Council Regulation (EC, Euratom, ECSC) No 2963/95 of 18 December 1995, adapting, with effect from 1 July 1995, the remuneration and pensions of officials and other servants of the European Communities and the weightings affecting such remuneration and pensions (OJ 1995 L 310, p. 1), confirmed the fixing of a general weighting for Germany based on the cost of living in Berlin, with retroactive effect from 1 July 1995.

- 8 Since the applicant considered that the Court should have applied to his pension slips for the period 1 July 1991 to 30 June 1994 the weightings based on the cost of living in Berlin rather than establishing them on the basis of the cost of living in Bonn, by a letter of 29 January 1996 he submitted a request under Article 90(1) of the Staff Regulations for his pension to be redetermined with retroactive effect.
  
- 9 The applicant's request was rejected by decision of 12 March 1996 of the Registrar of the Court of Justice acting in his capacity as appointing authority.
  
- 10 On 10 May 1996 the applicant submitted a complaint to the same effect to the Complaints Committee of the Court (hereinafter "the Committee"); he further requested that the Court should designate a date in the near future when the desired calculation would be made.
  
- 11 That complaint was rejected on 1 July 1996 on the ground that it had been submitted out of time and was therefore inadmissible. The acts adversely affecting the applicant within the meaning of Article 90(2) of the Staff Regulations were in this instance the pensions slips for the period in question. Accordingly, the applicant allowed the periods for bringing staff actions to expire.'

### The contested order

- 3 By application lodged at the Registry of the Court of First Instance on 16 October 1996, the appellant requested that the Committee's decision of 1 July 1996 be annulled and that his pension be re-calculated and definitively assessed for the

period from 1 July 1991 to 30 June 1994 according to the weightings based on the cost of living in Berlin fixed annually by the Council or, in the alternative, that a date be set in the near future for such re-calculation and assessment.

4 The Court of Justice contended that the action was inadmissible on the ground that the appellant's complaint was itself inadmissible because it was out of time.

5 As is clear from paragraph 33 of the contested order, the appellant advanced two arguments against that plea of inadmissibility. First of all, he essentially claimed that the Council had 'firmly undertaken' to make the weightings described as 'provisional' in the footnotes to Regulations Nos 3834/91, 3761/92 et seq. definitive and that, in those circumstances, the principle of the protection of legitimate expectations precluded any suggestion that he should have challenged his pension slips earlier. Secondly, he claimed that his action was not directed against an act of the appointing authority but against an omission by that authority.

6 As regards the first argument, the Court of First Instance pointed out at paragraph 34 of the contested order that it is settled case-law that an official cannot plead infringement of the principle of protection of legitimate expectations unless the administration has given him precise assurances.

7 The Court of First Instance found at paragraphs 35 to 37 of the contested order that, by the footnotes in Regulations Nos 3834/91, 3761/92 et seq., the Council was merely leaving open the possibility that it might alter the weightings for Germany but not binding itself to adjust them retroactively once fixed.

- 8 That led the Court of First Instance to conclude, at paragraph 38 of the contested order, that the Council could not be considered to have given the appellant ‘precise assurances’ as required by the case-law on the principle of the protection of legitimate expectations. Consequently, the Court of First Instance found that ‘the applicant cannot claim that the Council led him to entertain a “legitimate expectation” allowing him to hope that he might escape the application of the time-limits in the Staff Regulations referred to above’.
- 9 As regards the appellant’s second argument, the Court of First Instance held at paragraph 39 of the contested order that the monthly pension slips sent to him from 1 July 1991 to 30 June 1994 clearly constitute acts adversely affecting him, in so far as each of them determines the amount of his pension. The Court of First Instance found that, since each pension slip was sent to the appellant individually, he should have submitted a complaint against each one within three months, so complying with the time-limit laid down in Article 90 of the Staff Regulations. However, it pointed out, he submitted his complaint on 10 May 1996, almost two years after expiry of the prescribed period, which began to run when he received the final slip for June 1994. The Court of First Instance therefore declared the action to be inadmissible on the ground that the appellant’s complaint was out of time.
- 10 In addition, the Court of First Instance pointed out at paragraph 41 of the contested order that an official who has failed within the time-limit laid down in Articles 90 and 91 of the Staff Regulations to institute proceedings for the annulment of an act adversely affecting him cannot, by means of a claim for compensation for the damage caused by that act, make good that omission and thus contrive to make time begin to run afresh.
- 11 The Court of First Instance found at paragraph 42 of the contested order that the appellant’s action, which is based on an alleged omission by the Council, must be regarded as an attempt to circumvent the time-limits laid down in Articles 90 and



91 of the Staff Regulations in that by it he seeks, first, to obtain the annulment of a decision of the Committee which merely confirmed that the action was always inadmissible and, secondly, to obtain, by an action for compensation, the additional amount he would have received if the Berlin weighting had been applied from 1991.

- 12 The Court of First Instance therefore dismissed the action as manifestly inadmissible.

### The appeal

- 13 By his appeal the appellant claims that the Court should:

— set aside the contested order;

— annul the decision of the Committee of 1 July 1996;

— declare that the appellant's pension is to be re-calculated and definitively assessed according to the weighting based on the cost of living in Berlin laid down annually by the Council or, in the alternative, set a date in the near future for such re-calculation and assessment;

— order the Court of Justice and the Council to pay the costs.

- 14 The appellant put forward three pleas in law in support of his appeal, namely, first, that the Court of First Instance misinterpreted Regulations Nos 3834/91 and 3761/92 and Council Regulation (Euratom, ECSC, EC) No 3608/93 of 20 December 1993 adjusting, with effect from 1 July 1993, the remuneration and pensions of officials and other servants of the European Communities and weightings applied thereto (OJ 1993 L 328, p. 1) in finding that the Council did not, in those regulations, undertake to adopt a definitive weighting for Germany; secondly, that the Court of First Instance did not give consideration to the appellant's arguments on the principle of good faith or misconstrued them; and, thirdly, that the Court of First Instance altered the subject-matter of the dispute by claiming that his application was directed against the pension slips, whereas it was in fact directed against the appointing authority's failure to assess his pension definitively.
- 15 The Court of Justice contends that the appeal should be dismissed and the appellant ordered to pay the costs.
- 16 The Council contends that the appeal should be dismissed as manifestly inadmissible, and in the alternative as unfounded, and that the appellant should be ordered to pay the costs.

## Findings of the Court

### *Admissibility*

- 17 The Council submits that the appeal is manifestly inadmissible on two grounds.

- 18 The Council claims first of all that the appellant does not give any precise indication of the contested aspects of the order he wishes to have annulled or the specific pleas in law relied on in support of his appeal. He confines himself to rehearsing or reproducing word for word the pleas in law and arguments advanced before the Court of First Instance and so is merely seeking to have the action brought at first instance re-examined, contrary to the first paragraph of Article 49 of the EC Statute of the Court of Justice.
- 19 In that regard, it must first of all be observed that it is the Court's settled case-law that, under Article 168a of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see in particular Case C-8/95 P *New Holland Ford v Commission* [1998] ECR I-3175, paragraph 25).
- 20 Furthermore, under Article 112(1)(c) of the Rules of Procedure of the Court, the appeal must contain the pleas in law and legal arguments relied on.
- 21 It follows from those provisions that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see, in particular, *New Holland Ford v Commission*, paragraph 23).
- 22 In this case, it is clear from the text of the appeal lodged at the Court that the appellant has stated his case on the contested aspects of the order he wishes to have annulled in such a way that his appeal explains the errors of law he claims the Court of First Instance committed and sets out the pleas in law on which he is relying.

- 23 Next, it must be observed that an appeal can be based on arguments which have already been presented at first instance in order to show that by dismissing the pleas in law and arguments presented to it by the appellant, the Court of First Instance infringed Community law.
- 24 In this case, it is clear from the text of the appeal lodged at the Court that the appeal does not simply comprise a word-for-word rehearsal of the pleas in law and arguments contained in the application at first instance.
- 25 That being so, the Council's first argument must be dismissed.
- 26 The Council maintains, secondly, that the findings of the Court of First Instance as regards the inferences to be drawn by the appellant from the wording of Regulations Nos 3834/91 and 3761/92 and the Council's replies to the questions put by the Court of First Instance in the case of *Benzler v Commission*, cited above, are findings of fact which are not amenable to review by the Court of Justice.
- 27 In that regard, it need only be observed that the interpretation of the applicable regulations is a question of law capable of forming the subject-matter of an appeal.
- 28 It follows that the Council's second argument cannot be upheld and that accordingly the substance of the appeal must be examined.

*Substance*

- 29 The appellant relies on three grounds in support of his appeal.
- 30 First of all, the appellant argues that, in stating at paragraph 35 of the contested order that the weighting must be considered to be definitive, the Court of First Instance interpreted Regulations Nos 3834/91, 3761/92 and 3608/93 in a manner contrary to their wording and to paragraph 18 of the judgment in *Benzler*. He contends that the Court of First Instance was therefore wrong to dismiss his argument based on the principle of the protection of legitimate expectations.
- 31 In the appellant's submission, the expression 'decisions which the Council may be required to adopt' which the Council uses in the footnotes to the French and German versions of Regulations Nos 3761/92 and 3608/93 clearly indicates that the weighting laid down is provisional. That is also the inference to be drawn from Regulation No 3834/91, which refers to the weightings laid down for Germany as 'provisional figure[s]' and, moreover, in the last recital in the preamble, expressly gives reasons for the provisional nature of those weightings.
- 32 Furthermore, the Council itself, in its replies to the questions put to it by the Court of First Instance in the cases of *Benzler v Commission* and *Chavane de Dalmassy v Commission*, clearly stated that it intended to replace the provisional weightings with definitive weightings at a time yet to be determined and with retroactive effect. That being so, the principle of the protection of legitimate expectations militates against the suggestion that the appellant should have challenged his pension slips earlier.
- 33 In that regard, the Court of First Instance was right to note at paragraph 34 of the contested order that an official cannot plead infringement of the principle of the

protection of legitimate expectations if the administration has not given him precise assurances.

- 34 As the Court of First Instance pointed out at paragraphs 35 and 36 of the contested order, the appellant's suggested interpretation merely reflects one possible meaning of the contested provisions. As regards the expression 'without prejudice to the decisions which the Council may be required to adopt', it is clear from comparing the various linguistic versions that the Council is reserving its position as regards the possibility of altering the weightings.
- 35 It follows that, whilst Regulations Nos 3834/91, 3761/92 and 3608/93 do not rule out the possibility that the Council might adopt new weightings with retroactive effect, they provide no basis for supposing that possibility to be certain.
- 36 That being so, the Court of First Instance cannot be considered to have committed an error of law in finding at paragraph 38 of the contested order that the Council did not cause the appellant to entertain a legitimate expectation giving him grounds to hope that he might avoid the application of the time-limit laid down in the Staff Regulations for submitting a complaint.
- 37 The first plea must therefore be dismissed.
- 38 Secondly, the appellant argues that, in interpreting the provisions of the regulations cited above, the Court failed to give consideration to the arguments advanced by the appellant based on good faith, or distorted them, in finding that the Council did not give him any ground for hoping that a weighting based on the

cost of living in Berlin would be applied to him, whereas the appellant simply maintains that he was entitled to expect that a definitive weighting would be established, whatever it might be.

- 39 In adopting the German version of Regulations Nos 3834/91, 3761/92 and 3608/93, the Council gave the appellant to understand that a definitive regime the detailed rules of which were as yet unknown would in due course be adopted with retroactive effect, and that that definitive regime would rectify any omissions under the provisional regime and could, if necessary, be challenged by the appellant by means of the remedies provided for under the Staff Regulations. The weightings applicable to the appellant's pension were not laid down definitively in the three relevant regulations but only provisionally, thus causing the appellant to hope that they would subsequently be established definitively with retroactive effect.
- 40 As the Advocate General has pointed out at points 44 and 45 of his Opinion, the appellant's first plea cannot be dissociated from his second plea to the extent that this case only involves an infringement of the principle of good faith if the appellant's expectations concerning the Council's future approach were justified.
- 41 As is clear from paragraphs 34 to 36 of this judgment, the Court of First Instance was right to find that the Council did not cause the appellant to maintain well-founded hopes justifying the belief on his part that it would adopt a new regulation on the weightings for Germany laid down in Regulations Nos 3834/91, 3761/92 and 3608/93. Therefore, it cannot be the case that the Council failed to observe the principle of good faith.
- 42 Even supposing that the appellant had claimed before the Court of First Instance not that he had grounds for hoping that a weighting based on the cost of living in Berlin would be given retroactive effect but merely that a definitive weighting, whatever it might be, would be laid down, that would be irrelevant since the latter hope is itself unfounded.

- 43 Thirdly, the appellant criticises the Court of First Instance for having modified, at paragraphs 39 to 42 of the contested order, the subject-matter of the dispute, so as to enable it to declare the action inadmissible. His request to the appointing authority and his action before the Court of First Instance were not directed against provisional slips supplied to him but against the fact that the definitive regulation and the slips referred to in the Council's regulations took an inordinate time to materialise.
- 44 It was only towards the end of 1995 that the appellant became convinced that the only factor now preventing the Council from determining the definitive weighting also for the period 1 July 1991 to 30 June 1994 too was its own reluctance to do so. He submits that it was acceptable for no definitive weighting to be laid down as long as the uncertainties connected with the unpredictable situation to which Germany's unexpected reunification gave rise remained.
- 45 The appellant maintains that, contrary to the finding of the Court of First Instance at paragraph 42, he merely seeks a finding that the temporary nature of that situation, which came about as a result of those provisions, cannot be allowed to continue. He wishes to assert his right to have the provisional pension slips sent to him for the period from 1 July 1991 to 30 June 1994 replaced by definitive ones.
- 46 The appellant adds that the principle of equal treatment precludes using the cost of living anywhere other than in Berlin to establish a definitive weighting for Germany for the period from 1 July 1991 to 30 June 1994.
- 47 As regards first of all the appellant's argument that his action is directed against an omission on the part of the appointing authority, it must be borne in mind that, according to the case-law of the Court of Justice, a salary statement may



constitute a measure adversely affecting an official within the meaning of Article 90(2) of the Staff Regulations, and may therefore be the subject of a complaint and possibly an action (see in particular Case 264/83 *Delhez and Others v Commission* [1985] ECR 2179, paragraph 20). Therefore, since the monthly pension slips for the period from 1 July 1991 to 30 June 1994 adversely affecting the appellant were sent to him individually, he had an opportunity to submit a complaint under Article 90 of the Staff Regulations against each one of those pension slips within three months of receiving it.

48 It follows that the Court of First Instance was right to conclude that there was no omission on the part of the appointing authority, since it addressed measures to the appellant which adversely affected him and so were actionable.

49 Next, as regards the appellant's argument that whilst his pension slips may be regarded as definitive decisions for the purposes of the question whether an action challenging them is admissible, they are none the less provisional because they are based on provisional measures and therefore do not definitively resolve his situation, and that neither the necessity to ensure certainty in legal situations nor, therefore, time-limits can be raised as a defence to the appellant's claims, it must be borne in mind that even though Regulations Nos 3834/91, 3761/92 and 3608/93, which constitute the basis for the appellant's pension slips for the period from 1 July 1990 to 30 June 1994, laid down the weighting for Germany only provisionally, the acts constituted by those slips cannot be modified so long as the Council has not amended, with retroactive effect, those regulations. Therefore, each of the pension slips which establishes the appellant's individual rights for the period concerned constitutes a definitive act having adverse effect within the meaning of Articles 90 and 91 of the Staff Regulations, which the appellant should have challenged within the three-month time-limit laid down in the Staff Regulations.

50 Finally, as regards the appellant's argument that the Court of First Instance also modified the subject-matter of the action in finding at paragraph 42 of the

contested order that it constituted an application for a pension calculated according to the cost of living in Berlin for the period from 1 July 1991 to 30 June 1994, it need merely be observed that the validity of the reasoning of the Court of First Instance does not depend on this being so. Since the Court of First Instance has ruled on the actions open to the appellant and declared the only action available to him to be inadmissible because it was out of time, the applicant's objective in pursuing the action is irrelevant.

- 51 In those circumstances the appellant's argument concerning the principle of equal treatment must be held to be of no consequence.
- 52 It follows from the foregoing considerations that the appeal must be dismissed.

### Costs

- 53 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the successful party's costs if they are applied for in the successful party's pleadings. Article 69(4) of the Rules of Procedure provides that the Member States and the institutions which intervene in proceedings are to bear their own costs. Since the Court of Justice has applied for costs and the appellant has been unsuccessful, he must be ordered to pay the costs of this action. The Council shall bear its own costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Dismisses the appeal;
2. Orders Max Kögler to pay the costs;
3. Orders the Council of the European Union to bear its own costs.

Edward

La Pergola

Ragnemalm

Delivered in open court in Luxembourg on 25 May 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fourth Chamber