



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

6 September 2023 *

(Civil service – Officials – Retirement pension – Pension rights acquired before entry into the service of the European Union – Transfer to the EU scheme – Period of less than 10 years' service – Death – Refusal to repay capital representing national pension rights transferred and pension rights acquired in the PSEUI – Article 11(1) and Article 12(1)(b) of Annex VIII to the Staff Regulations – Unjust enrichment)

In Case T-171/22,

OR,

OS,

represented by N. de Montigny, lawyer,

applicants,

v

European Commission, represented by T. Bohr, M. Brauhoff and G. Niddam, acting as Agents,

defendant,

THE GENERAL COURT (Ninth Chamber),

composed of L. Truchot (Rapporteur), President, H. Kanninen and T. Perišin, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure,

further to the hearing on 11 May 2023,

gives the following

* Language of the case: French.

Judgment

1 By their action under Article 270 TFEU, the applicants, OR and OS, in their capacity as legal heirs of A ('A' or 'the deceased official'), seek, in the first place, the annulment of the decision of the European Commission's Office for the Administration and Payment of Individual Entitlements (PMO) of 12 July 2021 rejecting their request for repayment of the capital representing the national pension rights acquired by their father before his entry into the service of the European Union and transferred to the pension scheme of the EU institutions ('the PSEUI'), and of the capital corresponding to the contributions of that person to the PSEUI before his death and, moreover, in so far as it is considered that it provides additional reasoning, of the decision of 22 December 2021 by which their complaint was rejected and, in the second place, repayment of the sums claimed, together with interest at the rate set by the European Central Bank (ECB) for main refinancing operations, increased by two percentage points.

Background to the dispute

- 2 A entered the service of the European Union on 16 July 2003 as a member of the contract staff for auxiliary tasks. From 16 July 2004, he worked at the Commission as a member of the temporary staff, and then became an official on 16 April 2006.
- 3 Under Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), in September 2005 A carried out a transfer to the PSEUI of capital representing national pension rights acquired before he entered into the service of the European Union ('transfer in'). Payment of that capital to the PSEUI had given rise to a credit of additional years of pensionable service of a certain period.
- 4 A then requested and obtained leave on personal grounds for the period from 17 September 2008 to 16 September 2013, in order to enter the service of the ITER International Fusion Energy Organisation ('ITER'), established in Saint-Paul-lez-Durance (France). That leave on personal grounds had been renewed until his resignation, submitted on 1 July 2020 and effective on 16 September 2020.
- 5 Accordingly, A paid contributions to the PSEUI from 16 July 2003 until 16 September 2008, that is to say, for a period of five years and two months.
- 6 By email of 1 July 2020, the day on which he submitted his resignation to the Commission, A questioned the PMO on the procedure to follow in order to be entitled to a transfer, within the meaning of Article 11(1) of Annex VIII to the Staff Regulations ('transfer out'), of his pension rights acquired within the PSEUI to another pension scheme. In that same email, A explained that he had not completed the 10 years of actual service required to be entitled to a retirement pension.
- 7 In its reply, sent by email of 2 July 2020, the PMO indicated to A the procedure to follow to effect a 'transfer out'. The PMO also explained to A that, since he had completed less than 10 years' service, he was required to transfer the actuarial equivalent of his pension rights acquired within the PSEUI.
- 8 A died on 5 January 2021.

- 9 By email of 14 January 2021, the applicants' mother, former spouse of the deceased official, informed the PMO of his death. On the same day, the PMO replied to her, inter alia, that since the deceased official had not submitted a 'transfer out' request before his death, such a transfer was no longer possible.
- 10 On 18 March 2021, the applicants, who are the children and sole heirs of the deceased official, submitted a request in their capacity as legal heirs under Article 90(1) of the Staff Regulations, seeking payment, first, of the capital representing the national pension rights acquired by their father before his entry into the service of the European Union and transferred to the PSEUI and, secondly, of the capital corresponding to the pension rights acquired by their father within the PSEUI before his death.
- 11 By decision of 12 July 2021 ('the contested decision'), the PMO rejected the applicants' request.
- 12 In particular, the PMO stated in the contested decision that, since the deceased official had been in service for less than 10 years, he could not claim entitlement to an EU pension, with the result that neither his widow nor his orphans were eligible for reversion under the Staff Regulations. The PMO also indicated that no provision of the Staff Regulations allowed for repayment of the capital representing the pension rights acquired within the PSEUI, including the rights transferred to the PSEUI by a former official or a deceased staff member and explained that a 'transfer out' request was an individual right, to which only former officials and staff members were entitled, of which the deceased official had not availed himself following his resignation.
- 13 On 20 September 2021, the applicants lodged a complaint against the contested decision under Article 90(2) of the Staff Regulations.
- 14 By decision of 22 December 2021 ('the decision rejecting the complaint'), the applicants' complaint was rejected.

Forms of order sought

- 15 The applicants claim that the Court should:
 - annul the contested decision and, in so far as it is considered that it provides additional reasoning, the decision rejecting the complaint;
 - order the Commission to repay the sums claimed, together with interest at the rate set by the ECB for main refinancing operations, increased by two percentage points;
 - order the Commission to pay the costs.
- 16 The Commission contends that the Court should:
 - dismiss the action;
 - order the applicants to pay the costs.

Law

Subject matter of the action

- 17 It is apparent from the claim for annulment that the applicants request the Court to annul not only the contested decision, but also, in so far as it is considered that it provides additional reasoning, the decision rejecting the complaint.
- 18 According to settled case-law, a claim for annulment formally directed against the decision rejecting a complaint has the effect of bringing before the Court the act against which the complaint was submitted, where that claim, as such, lacks any independent content (judgment of 13 July 2018, *Curto v Parliament*, T-275/17, EU:T:2018:479, paragraph 63; see also, to that effect, judgment of 6 April 2006, *Camós Grau v Commission*, T-309/03, EU:T:2006:110, paragraph 43).
- 19 In the present case, given that the decision rejecting the complaint merely confirms the contested decision while specifying the reasons for that decision, it must be held that the claim for annulment of the decision rejecting the complaint lacks any independent content, and that there is therefore no need to rule on that claim specifically. However, when examining the legality of the contested decision, the statement of reasons for the decision rejecting the complaint should be taken into account, as it is deemed to cover the statement of reasons in the contested decision (see, to that effect, judgment of 30 April 2019, *Wattiau v Parliament*, T-737/17, EU:T:2019:273, paragraph 43 and the case-law cited).

Substance

The claim for annulment of the contested decision

- 20 In support of their claim for annulment, the applicants rely on a single plea in law, alleging unjust enrichment of the European Union.
- 21 In essence, the applicants submit that the budget of the European Union has been enriched by the capital corresponding, first, to the national pension rights acquired by the deceased official before his entry into the service of the European Union and transferred to the PSEUI and, secondly, to the contributions paid by the deceased official to the PSEUI in respect of the performance of his duties in the service of the European Union.
- 22 In particular, in the first place, the applicants argue that the contested decision is not based on any legal basis or judicial interpretation.
- 23 In that regard, as an initial point, the applicants maintain that the Commission was wrong to find that Article 11 of Annex VIII to the Staff Regulations allowed the European Union to retain the capital accumulated by the deceased official within the PSEUI.
- 24 First, the applicants dispute the irrevocable nature of the ‘transfer in’. In their submission, it follows from Article 8(5) of the general implementing provisions for Articles 11 and 12 of Annex VIII to the Staff Regulations, adopted by Commission Decision C(2011) 1278 of 3 March 2011, published in *Administrative Notices* No 17-2011 of 28 March 2011 (‘the GIP’) that the decision of an official or a staff member to carry out a ‘transfer in’ of the capital corresponding

to the national pension rights acquired before he or she entered the service of the European Union to the PSEUI is irrevocable only in so far as that official or staff member receives the benefits paid in the context of that scheme at a later stage. The applicants add, in the alternative, that, if that provision must be interpreted as meaning that the ‘transfer in’ is irrevocable in any case, it must be disapplied inasmuch as it breaches the principle of unjust enrichment.

- 25 Secondly, as regards the ‘transfer out’, the applicants claim that the situation in the present case has not been provided for by the Staff Regulations and the GIP. They take the view that, in the present case, the lack of specific steps for the purposes of that ‘transfer out’ is not the result of negligence or a voluntary decision of the deceased official, but arises solely from his sudden, unforeseeable and unavoidable death, less than four months after his resignation from the Commission.
- 26 Moreover, the applicants make clear that no provision of the Staff Regulations imposes a time limit for submitting a ‘transfer out’ request, with the result that the fact of not having formally requested that transfer cannot be interpreted as a waiver by the deceased official to transfer the disputed sums to another pension scheme. They also state that, by questioning the PMO on 1 July 2020 on the steps to be taken for that purpose (see paragraph 6 above), the deceased official clearly indicated his intention to effect that ‘transfer out’.
- 27 Next, the applicants argue that, although there is a legal basis for the payment of contributions by the deceased official to the PSEUI, those contributions were paid by him without any consideration in return and, therefore, *sine causa*. The contributions accumulated by the deceased official in the PSEUI on account of both the performance of his duties in the service of the European Union and the ‘transfer in’, which he carried out in 2005, have not ultimately created any right for him under the PSEUI, in so far as he has worked less than 10 years in the service of the European Union, which is the minimum period set out in the Staff Regulations to claim the grant of a retirement pension.
- 28 In that respect, the applicants take the view that the fact that the Staff Regulations expressly provide for the possibility of a former official or staff member to transfer the capital corresponding to his or her pension rights acquired within the PSEUI to another pension scheme, as well as the payment of a severance grant, demonstrates that that capital does not belong to the budget of the European Union. In addition, the applicants claim that the argument that the actuarial balance of the PSEUI could be compromised by the repayment of sums paid by former officials or staff members who are not eligible for a retirement pension has not been established. Furthermore, the applicants submit that the principle of solidarity, on which that balance is based, must be capable of benefiting the former official or former staff member who has contributed to that balance, failing which that solidarity would give rise to unjust impoverishment.
- 29 In the second place, the applicants argue that their impoverishment resulting from the enrichment of the European Union is actual and certain.
- 30 In that regard, the applicants submit that, since there has been no ‘transfer out’ of the capital corresponding to the pension rights acquired by the deceased official, they have not been eligible for additional rights corresponding to that capital, even though such a ‘transfer out’ to the pension fund linked to the deceased official’s last employment with ITER would have allowed them, as the

legal heirs of the deceased official, to receive a higher amount of compensation than that to which they are already entitled, the amount of that compensation depending on the total amount accumulated in that fund.

31 The applicants add that, had the deceased official not carried out a ‘transfer in’, they would also have been entitled to an annuity or a capital paid by the national scheme on which the deceased official depended before he entered into the service of the European Union.

32 The Commission disputes the applicants’ arguments.

33 As a preliminary point, it should be borne in mind that, according to the case-law, in order for a claim for repayment based on unjust enrichment of the European Union to succeed, two conditions must be satisfied, being proof, first, of an enrichment on the part of the European Union for which there is no legal basis and, secondly, of impoverishment on the part of the applicant which is linked to that enrichment (see judgment of 3 July 2018, *Transtec v Commission*, T-616/15, EU:T:2018:399, paragraph 156 and the case-law cited).

34 As regards the first condition referred to in paragraph 33 above, according to which the right to repayment from the person enriched is conditional upon there being no valid legal basis for the enrichment in question, it is appropriate to note the following.

35 It should be observed that, by their argument, the applicants do not call into question the existence of a valid legal basis relating to the payment of contributions by the deceased official to the PSEUI. Even though they complain that the various contributions made by the deceased official to the PSEUI – both the contributions resulting from the deceased official’s duties in the service of the European Union and those arising from the ‘transfer in’ which he effected in 2005 (see paragraph 3 above) – were ‘without any consideration in return and *sine causa*’ and without ‘any right to a pension ... having been created’, the applicants nevertheless clearly acknowledge in their pleadings that ‘there is a legal basis for the payment of contributions to the PSEUI’. Moreover, in reply to a question put by the Court at the hearing, the applicants’ representative confirmed that their argument was based on the absence of a valid legal basis ‘to retain the sums’ corresponding to the contributions paid by the deceased official to the PSEUI.

36 Thus, by their argument, the applicants merely request the Court to find that the retention by the Commission of all the contributions made by the deceased official to the PSEUI, following the death of that official, constitutes an enrichment of the European Union without a valid legal basis.

37 Since the deceased official paid contributions to the PSEUI as a member of the contract staff for auxiliary tasks, then as a member of the temporary staff and lastly as an official, the provisions relating to his pension rights under the conditions laid down in Chapter 3 of Title V of the Staff Regulations and in Annex VIII thereto, following his resignation, were applicable to him. In that respect, it is appropriate to note the following.

38 First, Article 36 of Annex VIII to the Staff Regulations sets out:

‘Salaries and invalidity allowances shall in all cases be subject to deduction of the contribution to the [PSEUI].’

39 Under Article 38 of Annex VIII to the Staff Regulations, ‘contributions properly deducted shall not be refunded’.

40 Article 83(2) of the Staff Regulations provides:

‘Officials shall contribute one third of the cost of [the PSEUI]. The contribution shall be 10.3%, of the official’s basic salary, the weightings provided for in Article 64 not being taken into account. It shall be deducted monthly from the salary of officials. ...’

41 Thus, it follows from those provisions and, in particular, from Article 36 of Annex VIII to the Staff Regulations and from Article 83(2) of the Staff Regulations, that there is an obligation on EU officials and staff members to contribute financially to the PSEUI.

42 Secondly, Article 77 of the Staff Regulations, which is contained in Chapter 3 of Title V of the Staff Regulations provides:

‘An official who has completed at least [10] years’ service shall be entitled to a retirement pension. He shall, however, be entitled to such pension, irrespective of length of service, if he is over pensionable age, if it has not been possible to reinstate him during a period of non-active status or in the event of retirement in the interests of the service.

...

The pensionable age shall be 66 years.

...’

43 Pursuant to Article 11(2) of Annex VIII to the Staff Regulations, an official or staff member who enters the service of the European Union after leaving the service of a government administration or of a national or international organisation or after having pursued an activity in an employed or self-employed capacity is entitled, after establishment but before becoming eligible for payment of a pension within the meaning of Article 77 of the Staff Regulations, to have paid to the European Union the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities.

44 Under Article 11(1) of Annex VIII to the Staff Regulations:

‘An official who leaves the service of the Union to:

- enter the service of a government administration or a national or international organisation which has concluded an agreement with the Union;
- pursue an activity in an employed or self-employed capacity, by virtue of which he acquires pension rights under a scheme whose administrative bodies have concluded an agreement with the Union,

shall be entitled to have the actuarial equivalent of his retirement pension rights updated to the actual date of transfer, in the Union transferred to the pension fund of that administration or organisation or to the pension fund under which he acquires retirement pension rights by virtue of the activity pursued in an employed or self-employed capacity.’

45 Under Article 12(1) of Annex VIII to the Staff Regulations:

‘An official aged less than the pensionable age whose service terminates otherwise than by reason of death or invalidity and who is not entitled to an immediate or deferred retirement pension shall be entitled on leaving the service:

...

(b) ... to the benefits provided under Article 11(1) or to the payment of the actuarial equivalent of such benefits to a private insurance company or pension fund of his choice, on condition that such company or fund guarantees that:

- (i) the capital will not be repaid;
- (ii) a monthly income will be paid from age 60 at the earliest and age 66 at the latest;
- (iii) provisions are included for reversion or survivors' pensions;
- (iv) transfer to another insurance company or other fund will be authorised only if such fund fulfils the conditions laid down in points (i), (ii) and (iii).'

46 It follows from those provisions that Article 11(2) of Annex VIII to the Staff Regulations provides that an official or a staff member who enters the service of the European Union after leaving the service of a government administration or of a national or international organisation or after pursuing an activity in an employed or self-employed capacity is entitled to effect a ‘transfer in’ to the PSEUI of pension rights acquired in respect of his or her previous professional activities. In addition, Article 11(1) of Annex VIII to the Staff Regulations, read in conjunction with Article 12(1)(b) thereof, provides that an official or a staff member who leaves the service of the European Union is entitled to effect a ‘transfer out’ of his or her pension rights acquired within the European Union to another pension fund or to a private insurance company which makes certain specific guarantees.

47 Thirdly, it is also clear from those provisions that the contributions to the PSEUI on the part of officials or staff members of the European Union – both the contributions resulting from the duties in the service of the European Union and those arising from a ‘transfer in’ – have the purpose of financing the PSEUI, with a view to a future payment of a retirement pension, in accordance with the Staff Regulations and the GIP. Those provisions are therefore not intended to constitute a capital which might be available to the official or the staff member in question. Accordingly, contrary to what the applicants submitted at the hearing, officials and staff members are not ‘entitled’ to the sums corresponding to their financial contribution to the PSEUI.

48 In the present case, it should be made clear that the enrichment of the European Union as a consequence of the payment by the deceased official of contributions to the PSEUI, the repayment of which is requested – both the contributions resulting from the deceased official’s duties in the service of the European Union and those arising from the ‘transfer in’ which he effected in 2005 (see paragraph 3 above) – is not lacking a valid legal basis, in so far as those contributions were made with a view to a future payment of a retirement pension, in accordance with the provisions of the Staff Regulations and the GIP.

49 Moreover, it should be observed that, since the deceased official did not complete 10 years’ service before his resignation nor reached the age of 66, those two conditions being cumulative under the provisions of Article 77 of the Staff Regulations, referred to in paragraph 42 above, he could not claim entitlement to a retirement pension.

- 50 It follows from all of the provisions referred to in paragraphs 38 to 45 above that, following his resignation from his duties in the service of the European Union, the deceased official could only request the ‘transfer out’ of the actuarial equivalent of his rights to the retirement pension acquired within the PSEUI, a part of which resulted from the ‘transfer in’ effected in 2005, either to a pension fund under which he thenceforth acquired rights on account of his duties with ITER, or to a private insurance company or a pension fund of his choice meeting the list of criteria defined in Article 12(1)(b) of Annex VIII to the Staff Regulations.
- 51 It should also be noted that no provision of the Staff Regulations, the annexes thereto or the GIP provides for the possibility or the obligation of repaying, in the event of the resignation of the official or the staff member which takes place after more than 1 year of service but before the completion of 10 years’ service, all or part of the contributions corresponding to the pension rights acquired within the PSEUI to a former official or staff member or, in the event of death, to his or her legal heirs, since the contributions in question are not comparable to capital which might be available to a former official or staff member. The administration’s only obligation in such circumstances is set out in Article 3(1) of the GIP and consists, from the moment when the service of the official or staff member terminates, in communicating the amount of the actuarial equivalent corresponding to all of the pension rights he or she has acquired, at that time, within the PSEUI.
- 52 Moreover, as regards the contributions corresponding to the transfer to the PSEUI of the capital representing the national pension rights acquired by the deceased before he or she entered the service of the European Union, it follows from the clear and precise wording of Article 8(5) of the GIP that any decision relating to a ‘transfer in’ procedure, such as described in paragraph 43 above, is, ‘by its very nature, irrevocable’. Only a ‘transfer out’ request makes it possible for the official or the staff member whose service in the European Union terminates to transfer the actuarial equivalent of his or her rights to a retirement pension acquired within the PSEUI to another pension scheme.
- 53 Moreover, even if the applicants’ argument were to be interpreted as seeking to put forward a plea of illegality in respect of Article 8(5) of the GIP (see paragraph 24 above), it must be noted that that argument has been put forward for the first time at the stage of the reply and that it cannot be regarded as amplifying a plea already put forward. Consequently, it constitutes a new plea which is not based on elements of law and of fact which came to light in the course of the procedure and which, therefore, must be rejected as inadmissible under Article 84 of the Rules of Procedure of the General Court prohibiting the introduction of new pleas in law in the course of proceedings.
- 54 In the present case, it is not disputed, notwithstanding the request for information addressed to the PMO on 1 July 2020 (see paragraph 6 above), that the deceased official had not submitted a ‘transfer out’ request before his death, based on the provisions of Article 11(1) of Annex VIII to the Staff Regulations, even though such a request for information supports the idea that A had planned to proceed with such a ‘transfer out’.
- 55 It follows that, in the absence of a payment of the deceased official’s retirement pension and of the submission by that official of a ‘transfer out’ request, the Commission, which, in any event, is not empowered by any legal provision to repay the legal heirs all or part of the capital corresponding to the pension rights acquired within the PSEUI or transferred by the deceased official to the PSEUI before his death, is not open to the allegation of enrichment without a valid legal basis on account of the retention, following the death of the deceased official, of all the contributions made by him to the PSEUI.

- 56 It follows from all the foregoing that it cannot be considered that the enrichment of the European Union as a consequence of the retention, following the death of the official, of his contributions to the PSEUI, the repayment of which is requested – both the contributions resulting from the official's duties in the service of the European Union and those arising from the 'transfer in' which he effected in 2005 – is lacking a valid legal basis, with the result that the first condition on which the finding of unjust enrichment depends is not satisfied and there is therefore no need to examine whether the second condition, referred to in paragraph 33 above, is satisfied.
- 57 Consequently, the single plea in law must be rejected and the application for annulment of the contested decision must be dismissed.

The claim for repayment of the sums claimed

- 58 By their second head of claim, the applicants request the Court to order repayment, first, of the national pension rights acquired by the deceased official before his entry into the service of the European Union and transferred to the PSEUI and, secondly, of the pension rights acquired by that official within the PSEUI before his death.
- 59 In the present case, the Court, having found that the single plea in law put forward by the applicants in support of the claim for annulment in the present action, alleging unjust enrichment of the European Union, was unfounded and had to be dismissed, the pecuniary claims referred to in paragraph 58 above, which are themselves based on the unlawfulness of the contested decision, must accordingly be rejected.
- 60 It follows from all of the foregoing that the action must be dismissed in its entirety.

Costs

- 61 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 62 Since the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders OR and OS to bear the costs.**

Truchot

Kanninen

Perišin

Delivered in open court in Luxembourg on 6 September 2023.

[Signatures]