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Staff Matters

Legal News from Union Syndicale

Pension rights – Art. 1(1) annex CEOS - "by analogy" - contract staff - Art. 21 and 22 of Annex XIII SR - act adversely affecting the applicant – legal certainty – effective judicial protection

Court of Justice: contract staff employed before 2014 can claim 5,56% higher pension, even where they cannot prove "functional continuity"

We present in this newsletter a recent, important judgment of the Court of Justice (ECJ) on pension rights of contract staff and on effective judicial protection. The benefits of the transitional regime for staff other than officials who had already contracts before 2004 or 2014 also apply to the many colleagues who cannot show to have worked in "functional continuity" (due to various functions on the basis of various contracts), but who have nevertheless contributed continuously to the pension scheme, says the ECJ. In the specific case, the applicant asked about the implications of the 2014 reform on his pension rights. The ECJ decided that the administration's reply on this was binding and thus challengeable at the court. The ECJ found that the applicant had continued to contribute to the pension scheme and hence is entitled to the benefits of the (more favourable) transitional scheme.

Case C-366/21 P, Picard / Commission of 15 December 2022
Case T-769/16, Picard / Commission of 24 March 2021

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Background

Under Art. 21 and 22 Annex XIII Staff Regulations (SR), officials who entered the service between 1 May 2004 and 31 December 2013 shall be entitled to 1,9 % of their salary for every year of pensionable service. Officials aged 35 years or more on 1 May 2014 and who entered the service before 1 January 2014 shall become entitled to a retirement pension at a certain age indicated there. Under Art. 1(1) of the annex to the CEOS, Art. 21 and 22 Annex XIII SR shall apply by analogy to other servants employed on 31 December 2013.

Facts of the Case

The applicant was recruited at the Commission in 2008 as contract staff, received several renewals and an indefinite contract in function group I. In 2014, he received a new indefinite contract in function group II. The 2014 reform defines a new annual rate of acquisition of pension rights of 1.8% less favourable than the previous rate of 1.9%. In addition, Art. 77(5) of the Staff Regulations (SR) sets the retirement age at 66 years, compared with 63 years previously. A transitional regime (Art. 21 and 22 of Annex XIII SR) stipulated that an official who entered the service between May 2004 and 31 December 2013 – despite the changes under the reform - continues to benefit from the annual accrual rate of pension rights of 1.9%. In addition, a civil servant aged 35 on 1 May 2014 who entered the service before 1 January 2014 is entitled to a retirement pension at the age of 64 years and 8 months. As cited above, Art. 1(1) of the annex to CEOS provides that those transitional provisions are to apply "by analogy" to other staff employed on 31 December 2013.

The applicant, who was unclear about the implications of the 2014 reform for his situation requested explanations from the manager of the Pensions Sector of the PMO (Office for the Administration and Payment of Individual Entitlements). That manager informed the applicant by an email that his pension rights had been modified as a result of the change of contract and that, therefore, as far as the applicant was concerned, the normal retirement age and the annual rate of acquisition of pension rights had changed to 66 years and 1.8% respectively as from 1 June 2014 (date on which his second contract took effect). The applicant lodged a complaint and filed an action against the reply of the PMO.

Decisions of the General Court and the Court of Justice

The **General Court** dismissed the action by deciding that it was in any case unfounded, without ruling on the admissibility. On the substance, it interpreted the phrase "by analogy" in Art. 1(1) annex CEOS (which refers to the benefits of the transitional clauses) in the sense that the employment relationship of contract staff is comparable to that of officials under the SR only in so far as no new contract has been concluded. Hence, the Court asked whether the applicant had started or not a new employment relationship. In this sense, it examined the contracts concluded between the applicant and the Commission and the characteristics of the posts on which he was engaged, and found that the change of function group had called into question the "**functional continuity**" of the applicant's employment relationship with the administration of the European Union. Thus, the Court decided that the second contract of the applicant had given rise to a new entry into service, which did not allow the applicant to benefit – for that new contract - from the application of the transitional provisions laid down in Annex XIII SR concerning the annual rate of accrual of pension rights and the retirement age.

In its decision on the appeal, the **Court of Justice** sets aside the Court's judgment at first instance and annuls the decision of the PMO on the applicant's pension rights:

1. The Ground of Appeal

The Court of Justice finds that the General Court **erred in law** when applying Art. 1(1) annex CEOS: the words "by analogy" must not be interpreted in the sense that this required that a new contract should not make a substantial change in the duties of that member of staff such as to call into question the functional continuity of his or her employment relationship. Instead, a contextual interpretation of Art. 1(1) annex CEOS demands that a staff member who had contributed to the financing of the pension scheme should benefit from transitional provisions – by analogy with what applies to officials in that same situation. Officials who entered the service before the date of the 2014 reform and whose duties would be substantially altered after this date would not, by that fact alone, lose the benefit of those transitional provisions. These officials, too, would continue to pay contributions to the pension scheme during the period of service. What counts for applying the transitional provisions relating to the pension scheme is to assess whether the applicant as a member of the contract staff is in a situation similar to that of an official. The similarity of both situations is in the change to the employment relationship after 31 December 2013 without any interruption in the payment of contributions to the EU pension scheme. Both groups shall benefit from the transitional provisions, because they both have not stopped contributing to the pension scheme. After having stated this error in law committed by the General Court, the ECJ decides itself on the case.

2. Admissibility

a) The General Court had not dealt with admissibility questions, assuming that the applicant's pleas were without merits. The ECJ considers the action for annulment to be admissible. The central admissibility

question was whether the reply of the PMO on the applicant's enquiry about his pension rights constituted an **act adversely affecting an official** within the meaning of Art. 90(2) SR. According to the case-law, **only acts or measures which produce binding legal effects capable of directly and immediately affecting the person's interests by bringing about a distinct change in his or her legal position** are acts adversely affecting him or her within the meaning of Art. 90(2) SR.

b) The Commission had argued that the email reply of the PMO was not a legally binding act, because it contained the caveat "please note that this message is sent by way of information and does not constitute a decision of the appointing authority/AECE that may be challenged pursuant to Article 90 of the Staff Regulations". The ECJ emphasises that it is required to examine the **content** and **context** of the act as well as the **powers** of the institution that adopted it, instead of solely referring to the form, which would amount to giving precedence to the form of the act over its actual substance. The PMO had informed that the applicant's "pension rights [had] been modified as a result of the change of contract" and indicated the applicant's retirement age and the annual rate of pension rights. The PMO manager thus stated that the applicant could not benefit from the transitional measures under Art. 1(1) annex to CEOS. The ECJ followed the opinion of AG Pikamäe and deduced from this reply by the PMO that it was not meant for information purposes only, but as a precise assurance that, in the view of the administration, the specified provisions applied to the applicant's situation. The department responsible for the management and payment of pension at PMO has provided the answer to the applicant.

c) In regard to the argument brought forward by the Commission that the final decision on pension rights will be only taken upon the beginning of the retirement the ECJ holds that the information about future rights **affects the legal position** of an applicant **immediately and directly**, otherwise the applicant would be able to ascertain his rights only at the time of retirement and would, until that time, be placed in a state of uncertainty as regards not only his financial situation, but also the age at which he may apply for retirement, which does not allow him to make immediate appropriate personal arrangements.

d) The Commission argued that the information about future pension rights was only an intermediate measure, but not the challengeable final decision. The ECJ replies on this that an intermediate measure which has independent legal effects may be the subject matter of an action for annulment where the illegality attaching to that measure cannot be remedied in an action brought against the final decision for which it represents a preparatory step. Where a challenge to the legality of an **intermediate act** in a later action against the final decision is not capable of ensuring effective judicial protection for the applicant against the effects of that act, it must be capable of being the subject matter of an action for annulment. That – in the opinion of the ECJ – is the case here: since the bringing of an action for annulment against the final decision adopted by the Commission at the time of retirement would not be liable to **afford effective judicial protection** to the staff member, the reply of the PMO constitutes an act adversely affecting him and must be capable of forming the subject matter of an action for annulment.

3. Substance

On the merits of the case, the ECJ applied a contextual interpretation of the Art. 1(1) annex CEOS and the transitional provisions. The applicant was employed under a contract on 31 December 2013 and had continuously contributed to the pension scheme. The ECJ thus concludes that the applicant – although his contract had been substantially amended after that date - shall benefit from the transitional scheme at the higher rate of pension rights, namely 1,9% and the right to a retirement pension at the age of (here) 64 years and 8 months. The decision of the PMO had to be annulled as being contrary to Art. 1(1) of the annex to SR.

Comments:

1. While, on the merits, the General Court put the emphasis on the **functional continuity** of the applicant's employment relationship with the administration of the European Union, the Court of Justice instead focusses on the question if the applicant had **continued to contribute to the pension scheme** (which he did). This is indeed the right aspect of comparison between the situation of a contract staff and that of an official, for the purpose of applying the transitional provisions under Art. 1(1) annex to CEOS and the pension rights under Art. 21 and 22 Annex XIII SR.

2. The judgment of the ECJ in case Picard is an important decision on pension rights of staff other than officials, the benefits of which can now be claimed by all staff who were under contract on 31 December 2013 or on 30 April 2004, and experienced substantial alterations in their contracts afterwards. So far, such staff with substantial alterations in their contracts had not benefitted from the transitional regime. As the 2014 reform defines a new annual rate of acquisition of pension rights of 1,8% for every year of pensionable service, less favourable than the previous rate of 1,9% under the transitional regime, the **difference in payment equals to 5,56% of the pension amount** (0,1% points out of 1,8%) for these periods.

3. A practical advice is that, should the administration not provide clarity about these pension rights, staff is encouraged to **actively seek clarification** about pension rights and, when doing so, to accurately choose the responsible department for these questions. Whether the reply is meant as binding is to be assessed not by regarding solely its form, but by an assessment of its **content** and **context**, as well as the **powers** of the institution providing the reply.

4. This line of case law is very beneficial for staff: it increases **effective judicial protection** and produces a higher level of **legal certainty**. While the effects of actions for annulment only extend between the parties, in the specific constellation decided in this case, it is a matter that can now be claimed by all staff concerned, in accordance with the procedures foreseen (s. comment 3 above).

5. What is of interest to staff in general is the possibility to obtain **reliable advice** about future pension rights. The administration's answer may have an informal appearance, but still - due to its content and context - can amount to a legally binding and therefore **challengeable act**:

an "act affecting the applicant adversely" in the sense of Art. 90(2) SR.

6. We consider that the concept of clarifying uncertainties about the legal situation of staff should also apply to **other rights** than pension entitlements. The case at hands made clear that replies by the administration may have binding effect immediately (with the consequence of being able to challenge the decision at the courts), even though a conclusive entitlement will be determined only years in the future.

7. Without stating its method explicitly, the ECJ relied on the arguments developed to establish **legitimate expectations** under Union law. The emergence of legitimate expectations requires "precise, unconditional and consistent information coming from authorised and reliable sources" (s. Joined Cases T-66/96 and T-221/97, para 104-107 – Mellet/ECJ; Case T-3/92, para. 58 - Latham; Case T-329/03, para. 79 – Ricci; Case F-4/07, para. 38 – Skoulidi). In the present case, the ECJ does not examine every single every precondition set up by the cited case law for the existence of legitimate expectations, but applied selected arguments in order to establish the important admissibility precondition of a measure which produces "binding legal effects capable of directly and immediately affecting the applicant's interests by bringing about a distinct change in his or her legal position", e.g. that the manager in PMO is the one responsible for providing the requested information. The method applied by the ECJ in this case is in line with its emerging jurisprudence to use general principles of law and fundamental rights as a means to determine reviewable acts in actions for annulment.