Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 16 October 2014[1]

Case C-647/13

Office national de l'emploi
v
Marie-Rose Melchior

(Request for a preliminary ruling from the cour du travail de Bruxelles (Belgium))

(Access to unemployment benefits in a Member State — Taking into account periods of employment completed as a member of the contract staff of an EU institution — Treatment of the period of unemployment in the European institutions as a period of employment — Principle of sincere cooperation)

1. The request for a preliminary ruling in the present case concerns the interpretation of the principle of sincere cooperation and of Article 34(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). It has been made in a dispute between Ms Melchior and the Office national de l'emploi (National Employment Office; 'ONEM') concerning ONEM's refusal to grant Ms Melchior unemployment benefit.

I – **Legislative framework**

A – *EU law*

2. Under Article 96(1) of the Conditions of Employment of Other Servants of the European Communities ('the Conditions of Employment'), a former member of the contract staff who becomes unemployed when his service with an institution of the European Union is terminated is eligible, under certain conditions, for a monthly unemployment allowance. The second subparagraph of Article 96(1) provides that, where he is entitled to unemployment benefits under a national scheme, the former member of the contract staff is obliged to declare this to the institution to which he belonged. In such cases, the amount of those benefits is deducted from the allowance paid by the European Union.

3. Article 96(2) provides that, to be eligible for this unemployment allowance, a former member of the contract staff must, among other things, be registered as seeking employment with the employment authorities of the Member State in which he establishes his residence and fulfil the obligations laid down by the law of that Member State for persons in receipt of unemployment benefits under that law. Article 96(4) provides that the allowance is payable from the date of termination of service for a period of not more than 36 months and which may in no case exceed the equivalent of one third of

1 — Original language: French.

the actual length of service completed. Payment may be suspended if, during that period, the former member of the contract staff ceases to fulfil the conditions laid down in Article 96(1) and (2). Payment is resumed if, before the expiry of that period, the former member of the contract staff again fulfils those conditions and is not entitled to national unemployment benefit.

4. Under Article 96(7), members of the contract staff must contribute one third of the financing of the unemployment insurance scheme. That contribution is deducted each month from the salary of the person concerned and paid, together with the remaining two thirds to be borne by the institution, into a Special Unemployment Fund which is common to the institutions and managed by the European Commission.

5. Article 96(9) provides that '[t]he national departments with responsibility for employment and unemployment, acting in accordance with their national legislation, and the Commission shall cooperate with each other in an effective manner in order to ensure that this Article is properly applied'.

B – *National law*

6. The Royal Decree of 25 November 1991 on unemployment (arrêté royal du 25 novembre 1991 portant réglementation du chômage; *Moniteur belge*, 31 December 1991, p. 29888; 'the Royal Decree'), in the version applicable at the material time, provides in Article 30 that, in order to qualify for unemployment benefit, a full-time worker over the age of 50 must complete a period of 624 working days during the 36 months preceding the application for benefits.

7. As provided in Article 37(1) of the Royal Decree:

'... normal work actually performed and additional services without compensatory rest shall be taken into account as work when carried out in an occupation or undertaking subject to social security in respect of unemployment and, contemporaneously:

…

2. the regulatory deductions for social security, including those in respect of unemployment, have been applied to the remuneration paid.

...'

8. The first subparagraph of Article 37(2) of the Royal Decree provides:

'Work carried out abroad shall be taken into account if it was carried out in employment which would give rise, in Belgium, to social security deductions, including those in respect of unemployment.

However, the first subparagraph shall apply only if, after the work carried out abroad, the worker has completed periods of work as an employed person under Belgian legislation.'

Under Article 38(1)(1)(a) of the Royal Decree, days which have given rise to payment of an allowance under the legislation relating to unemployment insurance are to be treated as working days for the purposes of the application of Article 30 et seq. of the Royal Decree.

II – **The facts of the main proceedings and the question referred for a preliminary ruling**

9. According to the order for reference, Ms Melchior, a Belgian national, had various jobs as an employed person in Belgium before working at the Commission in Brussels from 1 March 2005 to 29 February 2008 as a member of the contract staff.

10. By decision of 5 March 2008, ONEM refused the application for unemployment benefit which she had made on 1 March 2008. The ground for refusal was that she did not show that she had completed 624 working days during the 36 months preceding her application, as ONEM did not take into account the period during which she worked at the Commission. It nevertheless extended the reference period by the duration of that employment.

11. After being granted entitlement to the unemployment allowance provided for by the Conditions of Employment for a period of 12 months from 1 March 2008 and being employed in various jobs in Belgium between 20 August 2008 and 13 July 2009, Ms Melchior made another application for unemployment benefit on 14 July 2009, which was refused by ONEM on 26 August 2009, once again on the ground that she did not show that she had completed 624 working days during the 36 months preceding the application, namely in the period from 14 July 2006 to 13 July 2009. In its calculation, ONEM refused to take into account the period of activity in the service of the Commission and to treat, on the basis of Article 38(1)(1)(a) of the Royal Decree, the period of unemployment for which an allowance was paid under the Conditions of Employment as a period of work.

12. Ms Melchior contested ONEM's decision of 26 August 2009 before the tribunal du travail de Bruxelles (Labour Court, Brussels), which, by judgment of 14 February 2012, annulled that decision, declared that Ms Melchior was entitled to unemployment benefit from 14 July 2009 and ordered ONEM to pay the unemployment benefit due from that date.

13. ONEM appealed against that judgment to the cour du travail de Bruxelles (Higher Labour Court, Brussels), requesting it to set the judgment aside and to restore the decision of 26 August 2009. As it has doubts as to the compatibility of Articles 37 and 38(1)(1)(a) of the Royal Decree with EU law, that court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the principle of sincere cooperation and Article 4(3) TEU, on the one hand, and Article 34(1) of the [Charter], on the other, preclude a Member State, in relation to the issue of qualifying for unemployment benefit, from refusing:

— to take account of periods of work as a member of the contract staff of an EU institution established in that Member State, in particular where, both before and after the period of employment as a member of the contract staff, work was performed as an employed person under the legislation of that Member State;

— to treat days of unemployment for which payment is made under the [Conditions of Employment] as working days, although days of unemployment for which payment is made in accordance with the legislation of that Member State are so treated?'

III – **Analysis**

A – *Preliminary remarks*

14. It is necessary, first of all, to explore whether the applicant's situation falls within the scope of primary or secondary legislation on the free movement of workers and, second, to take a view on the argument put forward by the Commission in its observations concerning the nature of the Conditions of Employment as provisions of a regulation and their direct application to the facts in the main proceedings.

1. The application of primary or secondary legislation on the free movement of workers to the situation of the applicant in the main proceedings

15. According to settled case-law, an official of the European Union — as which contract staff covered by the Conditions of Employment must be treated — has the status of 'worker' within the meaning of Article 45(1) TFEU provided that he has exercised his right of free movement.[2] The Court has stated in this regard that a period of employment in an international civil service such as that of the European Union cannot be equated to a period spent in the civil service of another Member State and cannot therefore, in itself, create a link to one of the situations covered by that provision of the Treaty.[3]

16. In the present case, it is common ground that Ms Melchior has always resided and worked in Belgium, first for private undertakings, then for the Commission and, latterly, once again in the private sector. As she herself acknowledges, she has never, in the course of her working life, acquired the status of migrant worker. As a result, her situation, which remains purely domestic, is not covered by Article 45(1) TFEU.[4]

17. Furthermore, as is correctly pointed out by the referring court, Ms Melchior's situation during the period when she was employed in the service of the Commission also does not come under Regulation (EEC) No 1408/71,[5] which was adopted on the basis of Article 42 EC (now Article 48 TFEU) and seeks to coordinate Member States' social security legislation in order to implement the free movement of workers. The Court has stated in this regard that 'officials [of the European Union] cannot be characterised as workers within the meaning of Regulation No 1408/71 because they are not subject to national legislation on social security, as required under Article 2(1) of that regulation, which defines its scope *ratione personae*'.[6]

18. That said, a view has to be taken on the argument put forward by the Commission concerning the nature of the Conditions of Employment as provisions of a regulation and their direct application to the facts in the main proceedings.

2 — See, inter alia, judgments in *Echternach and Moritz* (389/87 and 390/87, EU:C:1989:130, paragraph 11); *Schmid* (C-310/91, EU:C:1993:221, paragraph 20); and *Ferlini* (C-411/98, EU:C:2000:530, paragraph 42).

3 — See judgment in *My* (C-293/03, EU:C:2004:821, paragraph 42).

4 — Judgment in *Uecker and Jacquet* (C-64/96 and C-65/96, EU:C:1997:285, paragraph 16 and the case-law cited).

5 — Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416). That regulation was repealed and replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

6 — See judgments in *Ferlini* (EU:C:2000:530, paragraph 41) and *My* (EU:C:2004:821, paragraph 35) and order in *Ricci and Pisaneschi* (C-286/09 and C-287/09, EU:C:2010:420, paragraph 26).

2. The nature of the Conditions of Employment as provisions of a regulation and their direct application to the facts in the main proceedings

19. In its observations, the Commission states that the Conditions of Employment were adopted by a Council regulation which, by virtue of the second paragraph of Article 288 TFEU, has general application, is binding in its entirety and is directly applicable in all Member States. According to the Commission, the applicant's situation is covered by Article 96 of the Conditions of Employment, which establishes entitlement to the unemployment allowance for former members of the contract staff and treats that allowance as complementary in relation to any benefit provided for by national legislation. The Commission argues that it runs counter to this complementary character, which must be respected by national authorities such as ONEM, for periods of employment completed within an EU institution not to be taken into consideration in establishing whether a former member of the contract staff qualifies for national unemployment benefit.

20. It is, admittedly, undeniable that Regulation (EEC) No 259/68 [7] laying down the Staff Regulations of Officials of the European Union ('the Staff Regulations') and the Conditions of Employment is, as is expressly stated in Article 11 thereof, 'binding in its entirety and directly applicable in all Member States'. As the Court has repeatedly stated, that regulation is binding on Member States 'in so far as their cooperation is necessary in order to give effect to those measures'. [8] Furthermore, as the Commission rightly points out, in the judgment in *Kristiansen* (EU:C:2003:652) the Court ruled that the unemployment allowance provided for in Article 28a of the Conditions of Employment, which has the same content as Article 96 but concerns members of the temporary staff, has complementary effect in relation to the benefit provided for by national legislation and that that effect, inasmuch as it is based on a provision of a regulation, is binding on the Member States and cannot be disregarded by national legislation. [9]

21. However, the Commission's argument that ONEM's obligation to take into account the periods spent by the applicant in the main proceedings in the service of the Commission when establishing whether she is entitled to national benefits stems from the fact that the unemployment allowance provided for by the Conditions of Employment is complementary and that the Conditions of Employment are laid down by regulation does not convince me, for reasons I will outline below.

22. First, it is settled case-law that EU law does not detract from the power of the Member States to organise their social security systems. Whilst it is true that, when exercising that power, Member States must comply with EU law, [10] the fact nevertheless remains that, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine both the conditions concerning the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits. [11]

23. Second, it is only where he *is entitled to unemployment benefits under a national scheme* that the former member of the contract staff is obliged to claim them under the second subparagraph of Article 96(1) of the Conditions of Employment and that the amount of those benefits is deducted from the allowance under Article 96(3). In other words, the unemployment allowance payable by the European Union acquires complementary character only *if and in so far as* the former member of the contract staff is also entitled to national unemployment benefit.

7 — Regulation of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968 (I), p. 30).

8 — See, inter alia, judgments in *Commission* v *Belgium* (186/85, EU:C:1987:208, paragraph 21) and *Kristiansen* (C-92/02, EU:C:2003:652, paragraph 32).

9 — Paragraph 34. The Court ruled to the same effect, with regard to the family allowances provided for in Article 67(2) of the Staff Regulations, in the judgment in *Commission* v *Belgium* (EU:C:1987:208).

10 — See, inter alia, judgment in *Commission* v *Portugal* (C-255/09, EU:C:2011:695, paragraphs 47 to 49 and the case-law cited).

11 — See, inter alia, judgment in *Kristiansen* (EU:C:2003:652, paragraph 31 and the case-law cited).

24. Third, a former member of the contract staff who fulfils the conditions set out in the first subparagraph of Article 96(1) of the Conditions of Employment derives from that provision an entitlement to an unemployment allowance whose existence is not dependent on whether that member of staff is also affiliated to a national unemployment insurance scheme or whether he fulfils the conditions for the grant of benefits under that scheme. It follows that, whilst it may have a complementary character in that it is in addition to any benefits provided by a national scheme, supplementing those benefits, the unemployment allowance provided for in Article 96 of the Conditions of Employment does not have its basis in the grant of such benefits. There is therefore a fundamental autonomy between the unemployment insurance scheme under the Conditions of Employment and the schemes organised by the Member States.

25. Fourth, the second subparagraph of Article 96(1) of the Conditions of Employment contains a special provision intended to govern the relationship between unemployment allowances under the Conditions of Employment and benefits under national schemes where the former member of the contract staff is entitled to both.[12] That provision fulfils a dual purpose. First, it operates as a rule against overlapping that works in favour of the European Union in that it provides that where the former member of the contract staff also fulfils the conditions for obtaining national benefits, those benefits are deducted from the amounts payable by the European Union, thereby reducing the financial burden on the European Union.[13] Second, it makes it possible to ensure equal treatment between members of the contract staff working in the service of institutions established in different Member States, guaranteeing them unemployment benefits at the same (minimum) level irrespective of the unemployment insurance legislation to which they may be subject at national level.[14]

26. It follows that, in the light of both its wording and its rationale, the second subparagraph of Article 96(1) of the Conditions of Employment is not, in principle, intended to limit the discretion enjoyed by the Member States in exercising the power conferred upon them to fix the conditions for eligibility to benefits under their unemployment insurance schemes. It merely requires modifications to those schemes which are necessary in order to respect the complementary character of the allowance under the Conditions of Employment where it runs in parallel with the benefits provided by those schemes.

27. This conclusion is not called into question by the case-law cited by the Commission in support of its argument. Both in *Commission* v *Belgium* (EU:C:1987:208) and in *Kristiansen* (EU:C:2003:652), the binding effect of the provisions of the Staff Regulations and Conditions of Employment establishing the complementarity of Community allowances in relation to benefits of like nature paid by national schemes was affirmed by the Court with regard to national legislation which frustrated that very principle of complementarity. The former case concerned a legislative amendment introduced by the Kingdom of Belgium in 1982 under which the amount of family benefit would be reduced by the amount of the benefits of like nature payable, inter alia, by virtue of the rules applicable to the staff of an institution governed by international law, even if the award of those benefits was described by those rules as supplementary to national family benefit. The second case, on the other hand, related to the application of a rule against overlapping governing the grant of Belgian unemployment benefit, under which such benefits were not payable if the employee received remuneration, a concept which included payments in respect of termination of employment and could also include the unemployment allowance provided for by the Conditions of Employment. It is interesting to note, moreover, that in the main proceedings in *Kristiansen* (EU:C:2003:652) the Belgian authorities had applied the same provision which is being challenged in the present request for a preliminary ruling, refusing to take into account the services performed by Ms Kristiansen as an employee of the

12 — See, by analogy, with regard to family allowances, judgment in *Commission* v *Belgium* (EU:C:1987:208, paragraph 22).

13 — Ibid., paragraph 23.

14 — Ibid.

Commission for the purposes of her entitlement to national unemployment benefits.[15] Whilst it is true that the question referred for a preliminary ruling related only to the application of the abovementioned rule against the overlapping of benefits, it must be stated that the Court, Advocate General Alber[16] and the Commission in its observations did not call into question, even indirectly, the compatibility of that refusal with the second subparagraph of Article 28a(1) of the Conditions of Employment, establishing the complementary nature of Community unemployment allowances paid to former members of the temporary staff, whose binding character was nevertheless strongly affirmed by all.

28. In the present case, unlike *Commission* v *Belgium* (EU:C:1987:208) and *Kristiansen* (EU:C:2003:652), the rule excluding periods of employment with an EU institution from the calculation of the working days required to qualify for national unemployment benefit does not call into question the complementary character of the allowance provided for by the Conditions of Employment.

29. It is true that the objection could be raised that the complementary character of the allowance under the Conditions of Employment is not really commensurate with a strict application of the contributory principle, as advocated by the Belgian Government, under which periods of employment which have not given rise to contributions to the Belgian social security scheme are disregarded. If such periods are disregarded, the result may be, in practice, that no national benefit will be paid to the former member of the contract staff, who will therefore remain wholly dependent on the scheme under the Conditions of Employment. However, where that result is merely the consequence of the application of objective conditions for entitlement to national unemployment benefit, it cannot be alleged, in my view, that the Member State concerned has failed to fulfil the obligations stemming from the first subparagraph of Article 96(1) of the Conditions of Employment, which do not include either the obligation to provide for an unemployment insurance scheme or the obligation to organise that scheme in such a way that the situation of a former member of the contract staff within an EU institution is covered in any event.

30. Fifth, I note that, even disregarding the conditions for entitlement to Belgian unemployment benefit and their application by ONEM, the situation of the applicant in the main proceedings, as described in the order for reference, *does not give rise to the joint application* of the scheme under the Conditions of Employment and the national unemployment insurance scheme, with the result that the special rule against the overlapping of benefits in the second subparagraph of Article 96(1) of the Conditions of Employment is not applicable in any event in the present case. The file shows that, after her work at the Commission came to an end, Ms Melchior received unemployment allowance under Article 96 of the Conditions of Employment for a period of 12 months from 1 March 2008. Under Article 96(4) of the Conditions of Employment, that allowance is payable to the former member of the contract staff from the date of termination of service for a period of not more than 36 months and in no case *exceeding the equivalent of one third of the actual length of service completed*. Accordingly, when, on 14 July 2009, she submitted to ONEM the application for national benefits which is at issue in the main proceedings, Ms Melchior, who worked at the Commission for a period of three years, had already benefited from all the cover provided by the scheme under the Conditions of Employment. Accordingly, ONEM cannot be accused, in this instance, of having disregarded the complementary character of the allowance provided for by the Conditions of Employment.

15 — Those authorities had, however, considered that the period completed by Ms Kristiansen in the service of the Commission had to be left out of account when determining the reference period.

16 — Opinion of Advocate General Alber in *Kristiansen* (EU:C:2002:141).

31. In the light of the above observations, I take the view that any obligation on the Belgian authorities to take into account the period during which the applicant in the main proceedings was employed in the service of the Commission for the purposes of calculating the working days required to qualify for national unemployment benefit cannot be based on the first subparagraph of Article 96(1) of the Conditions of Employment.

32. That said, such an obligation might stem from other applicable principles, which I will examine in the remainder of this Opinion.

B – *The question referred for a preliminary ruling*

1. The principle of sincere cooperation

33. By its question, the referring court wishes to ascertain, first of all, whether the principle of sincere cooperation [17] precludes a Member State, in relation to the issue of qualifying for national unemployment benefit, from refusing, first, to take account of periods of work as a member of the contract staff of an EU institution and, second, to treat days of unemployment for which an allowance is paid under the Conditions of Employment as working days, as is laid down in respect of days of unemployment for which benefit is paid in accordance with national legislation.

34. The referring court notes that an affirmative answer might be inferred from the Court's case-law on the portability of the pension rights of a worker who has been employed in the service of both a private employer and an EU institution. It points out that the Court of Justice has found on a number of occasions that Belgian legislation did not sufficiently ensure that portability, in breach, inter alia, of the Member States' obligations under the principle of sincere cooperation. It refers inter alia to the judgments in *Commission* v *Belgium* [18] and *My*. [19]

35. In the first of those judgments, the Court ruled that the Kingdom of Belgium had failed to fulfil its obligations under the Treaty by omitting to lay down the detailed rules for transferring rights acquired in the Belgian pension scheme to the Community pension scheme, as provided for in Article 11(2) of Annex VIII to the Staff Regulations. [20] In the second judgment, on the other hand, when requested to give a preliminary ruling by the tribunal du travail de Bruxelles, it ruled that Article 10 EC, in conjunction with the Staff Regulations, precludes national legislation which does not permit years of employment completed in the service of a Community institution to be taken into account for the purposes of entitlement to an early retirement pension under the national scheme.

36. ONEM, in the main action, and the Belgian Government, in its observations before the Court, take the view that this case-law cannot be applied to the unemployment insurance scheme. The Belgian Government states in particular that the applicant in *My* (EU:C:2004:821) had acquired pension rights both in the Belgian scheme and in the EU scheme, whereas in the present case Ms Melchior never became entitled to unemployment benefit in the Belgian scheme. In addition, it argues that in the judgment in that case the Court bases its reasoning on a specific provision, Article 11(2) of Annex VIII to the Staff Regulations, which expressly provides for the transfer of any rights acquired under the EU scheme to the national scheme, and that no analogous provision is laid down with regard to unemployment insurance.

17 — The referring court also mentions Article 4(3) TEU. However, the Treaty of Lisbon had not yet entered into force on the date of the decision contested in the main proceedings, 26 August 2009. For that reason, I will not refer to that provision in the remainder of this Opinion, but to Article 10 EC.

18 — 137/80, EU:C:1981:237.

19 — EU:C:2004:821.

20 — The same failure to fulfil obligations was established in respect of the Kingdom of Spain in the judgment in *Commission* v *Spain* (C-52/96, EU:C:1997:382).

37. In my view, these arguments are not convincing.

38. First of all, whilst it is true that in *Commission* v *Belgium* (EU:C:1981:237) the Member State in question was alleged to have made it impossible, by its omission, to give effect to a specific provision of the Staff Regulations, namely Article 11(2) of Annex VIII to the Staff Regulations, the Court recognised, more generally, that a Member State which refrains from adopting all the national measures required by a provision of the Staff Regulations [21] or *prevents the attainment of the objectives pursued by the Staff Regulations* [22] fails to fulfil its obligations under the principle of sincere cooperation, then enshrined in Article 5 of the EEC Treaty.

39. Second, in my view, the Belgian Government misunderstands the judgment in *My* (EU:C:2004:821).

40. In the first place, and contrary to the assertions of the Belgian Government, the question addressed by the Court in the judgment in *My* (EU:C:2004:821) is not substantially different from the question raised in the present case. Both Ms Melchior and Mr My were affiliated to a Belgian *contributory social security scheme* before being employed by an EU institution. Like Ms Melchior, Mr My was seeking *recognition of periods of employment* completed in the service of the European Union in order to gain *entitlement to a benefit under the social security scheme to which he had been affiliated*, in that case an early retirement pension. In both cases, entitlement depended on whether or not those periods are taken into consideration in the calculation of the days or years of employment required by the applicable national legislation in order to qualify for the benefit in question. The fact, highlighted by the Belgian Government, that, unlike Ms Melchior, Mr My had acquired pension rights under the Belgian scheme is entirely irrelevant since entitlement to the benefit claimed was, as in the case of Ms Melchior, subject to requirements which Mr My satisfied only if years spent in the service of the Council were taken into account.

41. In the second place, contrary to the contentions of the Belgian Government, the judgment in *My* (EU:C:2004:821) was not based on a specific provision of the Staff Regulations, namely Article 11(2) of Annex VIII to the Staff Regulations.

42. It should be noted in this regard that the question referred for a preliminary ruling in *My* (EU:C:2004:821) comprised two parts. First, the tribunal du travail de Bruxelles doubted the compatibility of both the Belgian legislation and the abovementioned provision of the Staff Regulations with the principles of free movement of workers and non-discrimination and with the rights guaranteed to citizens of the Union by the EC Treaty in that that legislation and that provision did not guarantee the transfer of pension rights from the Community scheme to the national scheme. Second, it expressed the same doubts with regard to national provisions which did not, for the purposes of the grant of an early retirement pension, permit periods of employment within a Community institution to be taken into account.

43. In paragraphs 24 to 26 of that judgment, the Court held that the applicant in the main proceedings *had never requested the transfer of the pension rights he acquired under the Community scheme to the Belgian pension scheme* but only that he be granted a national early retirement pension, and that he contested in that regard the refusal by the Office national des pensions (National Pensions Office (ONP)) to take into consideration his 27 years of service as an official at the Council in calculating the 35 calendar years of employment required to give entitlement to that pension. It concluded that the main proceedings concerned only whether Community law required the Belgian authorities to take into consideration the applicant's periods of employment completed both under the Belgian pension scheme and under the Community scheme and that there was therefore no need to answer the first part of the question referred.

21 — See paragraph 9 and, to the same effect, judgment in *Commission* v *Spain* (EU:C:1997:382, paragraph 9).

22 — In that case, equality of EU officials regardless of their State of origin and recruitment of the best qualified staff; see paragraph 19 of the judgment.

44. The Court's separation of the question of the transfer of rights acquired under the Community scheme to the national scheme from the question of the existence of an obligation on the Belgian authorities to take into account periods of employment at an institution meant that Article 11(2) of Annex VIII to the Staff Regulations was not in fact relevant, at least not directly, in answering the question asked by the referring court.[23] Whilst it is true that in paragraphs 44 and 45 of the grounds of the judgment,[24] the Court seems to refocus on that provision, in reality it merely refers to its interpretation of that same provision in the judgment in *Commission* v *Belgium* (EU:C:1981:237), which it takes as the starting point for its reasoning in the judgment in *My* (EU:C:2004:821).

45. Therefore, contrary to the assertions of the Belgian Government, that reasoning is not based on Article 11(2) of Annex VIII to the Staff Regulations, but rather on its underlying rationale which the Court sought to generalise and establish as a criterion for assessing the situation of workers affiliated to both the social security scheme of a Member State and the scheme under the Staff Regulations. In my view, this is clear from the relationship between paragraphs 44, 45 and 46 of the judgment in *My* (EU:C:2004:821). After stating in paragraphs 44 and 45 that, in its judgment in *Commission* v *Belgium* (EU:C:1981:237), it had ruled that Article 11(2) of Annex VIII to the Staff Regulations seeks to facilitate movement from national employment, whether public or private, to the Community administration and thus to ensure the best possible chance of being able to choose qualified staff who already possess experience, with the result that its infringement might 'impede the recruitment by the Community of national officials with a certain length of service', the Court finds, in paragraph 46, that '[*t*]*hat is also the case* where a Member State refuses to take into account, for the purposes of entitlement to an early retirement pension under its own scheme, periods of employment under the Community pension scheme'.

46. Thereby going beyond the framework of Article 11(2) of Annex VIII to the Staff Regulations, the Court defines the content of an obligation on the Member States which is *autonomous* in relation to the obligations under that provision, an obligation which it delimits, and whose scope it determines, by linking it, further on in the judgment, to the principle of sincere cooperation enshrined in Article 10 EC. Thus, in paragraph 47, after stating 'that national legislation such as that at issue in the main proceedings is [liable] to impede and therefore to discourage employment within an institution of the European Union', it concludes, in paragraph 48, that '[s]uch consequences cannot be accepted in the light of the duty of genuine cooperation and assistance which Member States owe the Community and which finds expression in the obligation laid down in Article 10 EC to facilitate the achievement of the Community's tasks'.[25]

47. In conformity with the line of reasoning adopted by the Court, the operative part of the judgment does not mention Article 11(2) of Annex VIII to the Staff Regulations, but derives the obligation on the Belgian authorities to take into account years of employment completed by the applicant in the service of the Council from Article 10 EC '*in conjunction with the Staff Regulations*'.

23 — Such an approach was necessary, moreover, as any obligation on the Member States to amend the rules applicable to the grant of benefits by their social security scheme in order to allow periods of employment completed in the service of the EU institutions to be taken into account cannot be derived from Article 11(2) of Annex VIII to the Staff Regulations or, as has been shown above, from Article 69 of the Conditions of Employment (see points 22 to 29 above).

24 — These paragraphs are preceded by the heading 'Article 11(2) of Annex VIII to the Staff Regulations and Article 10 EC'.

25 — The Court adopted similar reasoning in the judgments in *Bruce of Donington* (208/80, EU:C:1981:194) and *Hurd* (44/84, EU:C:1986:2, paragraphs 38 to 45), in which it derived from the principle of sincere cooperation, which was at that time enshrined in Article 5 of the EEC Treaty, respectively the prohibition on taxing the allowances received for travel and subsistence expenses by Members of the European Parliament (whose financial arrangements were, at the material time, governed by national law alone), thereby forming financial obstacles to their movement, and the prohibition against the imposition of domestic taxation on the European supplement of members of the teaching staff of a European school, such taxation being liable to interfere with the system adopted for financing the Community and apportioning financial burdens between the Member States.

48. Consequently, going beyond the specific features of *Commission* v *Belgium* (EU:C:1981:237) and *My* (EU:C:2004:821), in the judgments in those cases the Court specifically sought to affirm the principle that a Member State which adopts legislation liable to discourage employment within an institution of the European Union fails to fulfil the obligation to facilitate the achievement by the European Union of its tasks, contrary to the principle of sincere cooperation in conjunction with the provisions of the Staff Regulations. It should also be stated that in the judgment in *My* (EU:C:2004:821) the Court implicitly recognised that such an obligation can produce direct legal effects in relations between Member States and their citizens. [26]

49. Although that principle has been affirmed thus far only in cases relating to pensions, [27] it is theoretically capable of applying to any situation where a worker is refused enjoyment of social rights and advantages which he might claim under the legislation of a Member State solely on the ground that some of his professional career has been completed within EU institutions. [28] In my Opinion in *Gysen*, I had indeed already envisaged the possibility of applying the rule in *My* (EU:C:2004:821) outside the field of pensions, in particular with regard to family allowances, [29] as the referring court rightly points out.

50. It must therefore now be assessed whether the legislation at issue in the main proceedings, as interpreted and applied by the Belgian authorities, in so far as, in a case like the present one, it precludes periods completed in the service of the EU institutions from being taken into account for the purposes of entitlement to unemployment benefit under the national scheme, is liable to discourage employment within the European Union, either by dissuading certain persons from entering the service of the European Union or by inducing them to leave the employment that they carry on there, and thus to impede the European Union's recruitment and/or retention of the best qualified staff. I believe that that is the case.

26 — Considered in isolation, Article 4(3) TEU (and, previously, Article 5 of the EEC Treaty, Article 5 of the EC Treaty and Article 10 EC) has much too general a wording to be invoked before national courts or tribunals (see, for example, the judgment in *Hurd*, EU:C:1986:2, which concerned the obligation arising from Article 5 of the EEC Treaty to refrain from any unilateral measure that would interfere with the system adopted for financing the Community and apportioning financial burdens between the Member States, an obligation which the United Kingdom had infringed by imposing domestic taxation on the European supplement of members of the teaching staff of a European school; see also the Opinion of Advocate General Slynn in *Hurd*, EU:C:1985:222, point 30). However, the situation seems to be different where that provision applies together with other provisions of EU law which are themselves directly applicable (see, for example, judgment in *Acereda Herrera*, C-466/04, EU:C:2006:405, paragraphs 41 to 45) or where it is read in the context of rules which are derived from the general scheme of the Treaty or an EU act, as is the case in the judgment in *My* (EU:C:2004:821), and which permit the content of the obligation laid down by that provision to be defined sufficiently precisely and the provision to be held to be unconditional (see also the judgment in *Bruce of Donington*, EU:C:1981:194, paragraphs 14 to 20, where the taxation of the allowances received for travel and subsistence expenses by Members of the European Parliament, whose financial arrangements were, at the material time, governed by national law alone, was considered by the Court to interfere with the internal functioning of the Parliament by forming financial obstacles to the movement of its Members and infringing Article 5 of the EEC Treaty, in conjunction, inter alia, with Article 8 of the Protocol on Privileges and Immunities).

27 — It was confirmed inter alia in the order in *Ricci and Pisaneschi* (C-286/09 and C-287/09, EU:C:2010:420), which concerned an entitlement to a pension on retirement at the usual age. See also the reference made to Article 4(3) TEU in the judgment in *Časta* (C-166/12, EU:C:2013:792, paragraphs 36 and 37). On the other hand, contrary to what the referring court seems to state and as the Belgian Government correctly points out, in the judgments in *Öberg* (C-185/04, EU:C:2006:107) and *Rockler* (C-137/04, EU:C:2006:106) the situation of the applicants in the main proceedings — in respect of whom the Swedish authorities had refused, for the calculation of the amount of parental benefit, to aggregate periods during which they had been affiliated to the Joint Sickness Insurance Scheme in accordance with the rules of the Staff Regulations — was analysed by the Court only from the perspective of the freedom of movement of workers and paragraph 47 of the judgment in *My* (EU:C:2004:821) was cited merely for the purpose of determining that the legislation in question had a deterrent effect on the exercise of that freedom.

28 — Outside the field of social policy, the Court had adopted similar reasoning in a judgment prior to the judgment in *My* (EU:C:2004:821), which concerned a tax advantage not available to Community officials and other servants. In that case, the Court had found that the loss of such an advantage was not such as to dissuade people from entering the service of the Community institutions or from continuing in their service and thus to impede the functioning of those institutions; see judgment in *Tither* (C-333/88, EU:C:1990:131, paragraph 16).

29 — See my Opinion in *Gysen* (C-449/06, EU:C:2007:663, points 54 to 61). The main proceedings in that case concerned national legislation under which, in the context of the payment by the competent national body of family allowances for the dependent children of a self-employed worker, the child of the self-employed worker who was entitled to family allowances paid under the Staff Regulations was not taken into account for the purposes of determining the ranking of the other children, which under that legislation influenced the amount of the family allowances payable for those other children.

51. Contract staff are engaged by the institutions, agencies and other bodies of the European Union to perform specific duties or to replace officials or temporary staff of an institution who are unable for the time being to perform their duties (Articles 3a and 3b of the Conditions of Employment). [30] They are recruited on the basis of contracts which are concluded for a fixed period of at least three months and not more than five years (for the category of staff referred to in Article 3a of the Conditions of Employment) or three years (for the category of staff referred to in Article 3b of the Conditions of Employment) and are renewable for a maximum cumulative period of ten years and six years respectively. The short-term or medium-term prospect for workers in these posts is therefore, in principle, that of re-entering the national labour market. However, legislation like that at issue in the main proceedings, as interpreted and applied by ONEM, which does not include periods of employment that former members of the contract staff have spent in the service of the European Union in the calculation of the working days giving entitlement to unemployment benefit prevents them from acquiring the rights, in terms of access to those benefits, which they would have been granted if they had continued to be employed on the national labour market. In view of the temporary nature of the posts held by these staff, of the fact that re-entry to national labour markets on termination of their posts is the most likely prospect for them and of the fact that there is increasing insecurity and discontinuity on those markets, which makes further periods of unemployment a realistic prospect, such an effect cannot be considered to be too indirect and marginal to create the deterrent (or incentive) effect referred to in the Court's case-law cited above. [31]

52. It is true that, upon termination of their duties, contract staff are entitled, in principle and where payment is not made under a national scheme, to the allowance provided for by the unemployment insurance scheme laid down by the Conditions of Employment for a (maximum) period of three years. [32] However, first, that cover is provided only where the former member of the contract staff has completed a minimum of six months' service (Article 96(1)(c)) and it is limited to a period not exceeding the equivalent of one third of the actual length of service (Article 96(4)), with the result that it is very limited, in practical terms, for staff employed on the basis of short-term contracts and may even be completely absent where that term is less than six months. Second, under legislation like that at issue in the main proceedings, as interpreted and applied by ONEM, once the period of cover under the Conditions of Employment (a period of up to 36 months) has ended, a former member of the contract staff who re-enters the national labour market will have no unemployment insurance until he has completed the number of working days required to qualify for national benefits. [33] From this perspective, such legislation is liable to affect in particular former members of the contract staff who have completed long periods of employment in the service of the European Union.

53. In the light of the foregoing, I take the view that the refusal by the Belgian authorities in a case like the present one to take into account, for the purposes of entitlement to unemployment benefit under the national scheme, periods of employment completed in the service of the European Union is liable to make the prospect of joining the EU administration as a member of the contract staff less attractive and thus to interfere with the European Union's recruitment policy for an important category of its staff. That refusal breaches the Member States' obligation under Article 10 EC, read in conjunction with the Conditions of Employment, to take all necessary and appropriate measures to give full effect to the Conditions of Employment and to avoid damaging the interests of the European Union and jeopardising the attainment of its objectives. Neither the fact, relied on by the Belgian Government,

30 — The category of contract staff was introduced into the Conditions of Employment by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other servants of the European Communities (OJ 2004 L 124, p. 1).

31 — I stated the opposite view in my Opinion in *Gysen* (EU:C:2007:663) with regard to family allowances.

32 — I would point out that, under Article 96(4) of the Conditions of Employment, payment of that allowance is suspended if the former member of the contract staff re-enters the employment market. Payment of the allowance is resumed if, before the expiry of the three-year period, he becomes unemployed again.

33 — Furthermore, it does not seem that the Royal Decree or the consistent practice of ONEM allows periods of employment spent in the service of the European Union to be left out of account in determining the three-year reference period for the calculation of the working days required to qualify for unemployment benefit. According to the papers in the case, ONEM left these periods out of account in the first application for benefits made by Ms Melchior, but not in the second.

that the national unemployment insurance scheme is contributory and accordingly only workers who have previously contributed to the scheme may claim its social benefits, nor the power conferred upon the Member States to lay down the conditions governing eligibility for the benefits provided by their social security schemes can call into question such an obligation, which seeks to ensure the continuity of the social rights of workers who have been employed in the service of the EU institutions.

54. With regard to the failure to treat days of unemployment for which an allowance is paid under the Conditions of Employment as working days for the purposes of calculating the working days required to qualify for unemployment benefit, it is apparent from the documents filed with the Court Registry that, if the work completed in the service of the Commission during the reference period, namely from 14 July 2006 to 13 July 2009, were taken into account, the applicant would be able to show the 624 working days required by Article 30 of the Royal Decree *without it being necessary to take into account the period in which she received unemployment allowance under Article 96 of the Conditions of Employment*.[34] There is therefore no need for the Court to give a ruling in this regard.

55. If it nevertheless considered it expedient to do so, I take the view that the conclusion set out in point 53 above must be reached, for the reasons set out above, with regard to the failure, in a case like the present one, to treat days for which an allowance is paid under the Conditions of Employment as working days. In this regard, the fears expressed by the Commission in its observations and in its answer to the written question asked by the Court, namely that such treatment could fail to have regard to the complementary nature of the allowance under the Conditions of Employment or allow overlapping of the allowance under the Conditions of Employment and national benefits, do not seem to be founded. The fact that a former member of the contract staff who does not satisfy the conditions for entitlement to national benefits when he terminates his duties might fulfil those conditions subsequently, in the course of the period when he receives unemployment allowance under the Conditions of Employment (or even after the end of that period), because under national legislation days for which benefit is paid during that period are treated as working days, does not seem, in itself, to affect the complementary character of the allowance under the Conditions of Employment or the effectiveness of the rule against overlapping in Article 96 of the Conditions of Employment. Obviously, in order to respect that complementary character, the former member of the contract staff will have to submit a new application for national benefit once, because days of unemployment for which an allowance is paid under the Conditions of Employment are treated as working days, he qualifies for payment of that benefit.

2. Article 34 of the Charter

56. In view of my proposed answer to the question referred for a preliminary ruling in so far as the question concerns the principle of sincere cooperation, there is no need also to examine the question in the light of Article 34(1) of the Charter. The brief comments below are therefore made only for the sake of completeness. In addition, they assume that the Court considers the Charter to be applicable retroactively to the facts of the main proceedings.[35]

34 — See the breakdown produced by the tribunal du travail de Bruxelles in paragraph 4.1.4 of the grounds of the judgment of 14 February 2012 against which ONEM has appealed, according to which, in the reference period, the applicant could show 507 working days in the service of the Commission and 150 working days as a temporary worker for private companies, totalling 657 working days, which exceeds the 624 days required by Article 30 of the Royal Decree. See also the notice issued by the State Counsel's Office on 13 January 2012.

35 — In this regard I would simply state that the present case differs from *DEB* (C-279/09, EU:C:2010:811) and *Banif Plus Bank* (C-472/11, EU:C:2013:88), where a general principle of EU law was invoked, namely the principle of effective judicial protection, which already existed before it was enshrined in Article 47 of the Charter.

57. It is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. [36] As the Court stated in the judgment in *Åkerberg Fransson* (EU:C:2013:105), situations cannot exist which are covered by EU law without those fundamental rights being applicable. The applicability of EU law therefore entails applicability of the fundamental rights guaranteed by the Charter. [37] Where, on the other hand, a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction. [38]

58. In the present case, it is common ground that, in defining the conditions for eligibility for Belgian unemployment benefit, the national legislation at issue in the main proceedings does not implement an act of EU secondary legislation. In addition, it is clear from the above reasoning that Ms Melchior's legal situation is purely domestic [39] and is not covered directly by a provision of the Staff Regulations or of the Conditions of Employment. [40] Furthermore, the Court has already held that the situation of an official does not fall within the scope of EU law simply because of the existence of an employment relationship with the European Union. [41]

59. Thus, it is only if the Court should, as I suggest, consider that Article 10 EC, read in conjunction with the provisions of the Conditions of Employment, is applicable to the dispute in the main proceedings that Ms Melchior's situation would be governed by EU law and the Charter would therefore be applicable. [42]

60. Under Article 34(1) of the Charter, '[t]he Union recognises and respects the entitlement to social security benefits and social services providing protection … in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices'. As is clear from its wording and from the Explanations relating to the Charter [43] ('the Explanations'), that provision sets out a 'principle' [44] based on Articles 153 TFEU and 156 TFEU, Article 12 of the European Social Charter and point 10 of the Community Charter of Fundamental Social Rights of Workers. [45] In accordance with Articles 51(2) and 52(5) of the Charter, the provisions of the Charter which contain principles are addressed first and foremost to public authorities, have merely programmatic character [46] (as opposed to the prescriptive character of the provisions setting out 'rights') and require 'implementing acts'. [47] With regard to their enforceability, they do not create, at least in the absence of 'legislative implementation', rights to positive action by the Member States' authorities [48] and may be invoked in law only as interpretative references or as parameters for the ruling on the legality of the acts for their implementation. [49]

36 — See judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19). See also judgment in *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 33).

37 — See judgments in *Åkerberg Fransson* (EU:C:2013:105, paragraph 21) and *Pfleger and Others* (EU:C:2014:281, paragraph 34).

38 — See judgment in *Åkerberg Fransson* (EU:C:2013:105, paragraph 22).

39 — See points 15 and 16 above.

40 — See points 19 to 31 above.

41 — See judgment in *Johannes* (C-430/97, EU:C:1999:293, paragraphs 26 to 29).

42 — I would state, as an incidental point, that the Charter would be applicable even if it were to be concluded that Article 10 EC, although *applicable* in the present case, cannot be *invoked* by Ms Melchior in legal proceedings. This conclusion follows from the judgment in *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraphs 30 to 41).

43 — OJ 2007 C 303, p. 17.

44 — The distinction between 'principles' and 'rights' recognised by the Charter is mentioned in its preamble and explained, in particular, in Article 51(1).

45 — See the Explanation on Article 34 of the Charter.

46 — Under Article 51(1), rights must be respected, whereas principles must only be 'observed' or 'promoted'.

47 — See the first sentence of Article 52(5) of the Charter.

48 — With regard to the inability to enforce directly the social principles established by the Charter, see, in relation to Article 27 of the Charter, judgment in *Association de médiation sociale* (EU:C:2014:2, paragraphs 42 to 49). That judgment also limited the enforceability of those principles in horizontal situations to reliance on them solely for purposes of interpretation.

49 — See the second sentence of Article 52(5) of the Charter.

61. Here, the legislation at issue in the main proceedings represents the manifestation at national level of the principles of solidarity and protection which are expressed at EU level by Article 34(1) of the Charter. The application of such legislation in a situation covered by EU law must have due regard to that provision of the Charter. However, by precluding, for the purposes of entitlement to national unemployment benefits, the aggregation of periods of employment for which contributions have been paid to the national social security scheme and periods which have given rise to payment of contributions to the scheme established by the Conditions of Employment, in a situation like the present one the legislation at issue in the main proceedings, as interpreted and applied by the Belgian authorities, effectively denies the worker's entitlement to social security benefits in the case of loss of employment, in contravention of the principle laid down in Article 34(1) of the Charter.

62. For the above reasons, I consider that, should the Court consider the Charter to be applicable *ratione temporis* to the facts of the main proceedings and conclude that the legislation at issue in the main proceedings, as interpreted and applied by the Belgian authorities, fails to comply with the Member States' obligations stemming from the principle of sincere cooperation set out in Article 10 EC, read in conjunction with the Staff Regulations, that legislation would also be contrary to Article 34(1) of the Charter.

IV – **Conclusion**

63. In the light of the foregoing considerations, I suggest that the following answer be given to the cour du travail de Bruxelles:

Article 10 EC, in conjunction with the Conditions of Employment of Other Servants of the European Communities, precludes, in circumstances such as those in the main proceedings, legislation of a Member State which, in relation to a worker's qualification for national unemployment benefit, does not take into account periods during which that worker was employed as a member of the contract staff of an institution of the European Union.