

Compulsory pension scheme of an essentially contributory nature and Article 1 of Protocol No 1 of the ECHR: disproportionate nature of non-consideration of the partial payments

25/11/2021



Ruling of 25 November 2021, appeal no. 20-17.234

Partial quashing

RULING OF THE SECOND CIVIL CHAMBER OF 25 NOVEMBER 2021, APPEAL NO. 20-17.234

SOCIAL SECURITY, OLD-AGE PENSION FOR THE SELF-EMPLOYED

Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms implies, when a person is subject to compulsory membership of an essentially contributory pension scheme, a reasonable relationship of proportionality expressing a fair balance between the funding requirements of the pension scheme in question and the individual pension rights of contributors. Article L. 644-1 of the Social Security Code and Article 2 of the Executive Order of 22 April 1949, as amended, relating to the supplementary old-age pension scheme for doctors, on the one hand, and Article L. 645-2 of the Social Security Code and Article 2 of the Executive Order of 27 October 1972, as amended, aimed at making the supplementary old-age pension scheme for contracted doctors compulsory, on the other hand, precise that, apart from the cases to which they refer, only full payment of the annual contribution due for each of these schemes entitles the beneficiary to the allocation of pension points. For determining the rights of an insured person who is the subject of court-mandated winding up proceedings that have been closed for deficiency of assets, under these contribution-based schemes, excluding years wherein contributions were not paid in full, without taking partial payments into account, while contributing to the financial stability of these schemes, unduly infringes the basic guaranteed right in view of its intended purpose, and does not strike a fair balance between the competing interests.

COUR DE CASSATION (COURT OF CASSATION)

Public hearing of 25 November 2021 Partial quashing Mr PIREYRE, President

Ruling No. 1061 FS-B+R

Appeal No. W 20-17.234

F R E N C H R E P U B L I C IN THE NAME OF THE FRENCH PEOPLE RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), SECOND CIVIL CHAMBER, OF 25 NOVEMBER 2021

On the report of Ms Vigneras, Judge Referee, the observations of SCP L. Poulet-Odent, lawyer for Mr Cottet, of SCP Foussard et Froger, lawyer for *Caisse Autonome de Retraite des Médecins de France* (French medical practitioners' independent pension fund), and the opinion of Mr Gaillardot, First Advocate-General, after the arguments at the public hearing of 6 October 2021, where were present Mr Pireyre, President, Ms Vigneras, Reporting Judge Referee, Ms Taillandier-Thomas, Elder Judge, Ms Coutou, Ms Renault-Malignac, Mr Rovinski, Ms Cassignard, Ms Lapasset, Mr Leblanc, Judges, Ms Dudit, Mr Labaune, Reporting Judges, Mr Gaillardot, First Advocate-General, and Ms Aubagna, Chamber Registrar,

the Second Civil Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the aforementioned President and Judges, after having deliberated in accordance with the law, has delivered the present ruling.

Facts and procedure

1. According to the ruling under appeal (Bordeaux, 13 May 2020), delivered on remand after quashing (Second Civil Chamber, 15 February 2018, no. 17-15.208), Mr Cottet (the insured) was a member of the *Caisse Autonome de Retraite des Médecins de France* (the Fund) from 1 April 1975 to 31 December 1997, and then as of 1 April 2003.
2. In the ruling of 28 June 2010, the *Tribunal de grande instance* (Tribunal of First Instance) of Pau mandated judicial reorganisation proceedings against the insured, which were transformed into winding-up proceedings by 6 July 2011 ruling, and subsequently closed for deficiency of assets on 22 April 2013.
3. In order to determine the rights of the insured person with effect from 1 January 2012, under the supplementary old-age pension scheme for doctors on the one hand, and the supplementary old-age benefits scheme for *médecins conventionnés* (contracted doctors) on the other hand, the fund excluded the years during which contributions had not

been paid in full by the insured person.

4. The insured party appealed to a social security jurisdiction.

Reviewing plea of the main appeal

Statement of plea

5. The insured objects to the ruling dismissing his claim for damages, whereas:

"1°/ Any fault committed by a pension fund engages its liability, as soon as said fault has caused a damage. In holding that the Fund had not committed a fault by refusing to wind the insured's pension up to the amounts due to him, on the pretext that the position that the Fund had adopted had been confirmed by some *cours d'appel* (Courts of Appeal), the *cour d'appel* (Court of Appeal) infringed the former Article 1382 of the Civil Code.

2°/ The fault committed by a pension fund engages its liability. The *cour d'appel* (Court of Appeal) did not provide a legal basis to its decision in the light of the former Article 1382 of the Civil Code by holding that the Fund had not committed a fault in refusing to wind the insured's pension up to the amounts due to him. This refusal was because of the Fund's adopted principle position which had been confirmed by *cours d'appel* (courts of appeal), when the consequences of the overlap between retirement contributions and collective proceedings, in terms of liquidation of pensions, had been clearly laid down by the *Cour de cassation* (Court of cassation) in 2011.

3°/ The payment of a very low retirement pension obviously encourages the pensioner to combine a job with their retirement, when this possibility is open to them. After having noted that the pension paid to the insured by the Fund was only EUR. 378 net per month, by ruling that proof had not been made that he was forced to resume professional activities in order to live and receive a decent income, the *cour d'appel* (Court of Appeal) did not draw the legal conclusions from its own findings in the light of the former Article 1382 of the Civil Code.

4°/ Trial courts must examine all the evidence submitted for arguments. The *cour d'appel* (Court of Appeal) disregarded the provisions of Article 455 of the Civil Procedure Code by ruling that it had not been proven that the insured, who received only EUR. 378 in pension per month, had been forced to resume professional activity in order to live, without taking into account the insured's letter of 10 May 2013. Addressed to the fund's *commission de recours amiable* (amicable settlement board), the letter reiterated his request for a full pension, and stated that he could not decently live on his basic pension and assistance granted by the social welfare fund. Therefore, he was forced to look for opportunities to temporarily replace general practitioners during their absences.

5°/ Trial courts must respond to all the operative submissions provided by the parties. The *cour d'appel* (Court of Appeal) did not satisfy the requirements of Article 455 of the Civil Procedure Code in holding that the insured did not prove any non-material damage in connection with the refusal of the Fund to pay him a normal retirement pension, and without responding to his submissions that argued that he had suffered non-material damage as a result of this refusal by the Fund, for six years, to pay him the pension arrears to which he was entitled."

Court's response

6. The ruling states that the Fund, whose analysis against the insured had been upheld by several courts of appeal, had adopted a position that had already been judicially confirmed.

7. From these statements, the *cour d'appel* (Court of Appeal) was able to deduce an absence of fault on the part of the Fund engaging its liability towards the insured.

8. The plea, which is consequently unfounded in its first two parts, is irrelevant as to the remainder.

Reviewing plea raised by the Court of its own motion

9. After notice given to the parties, in accordance with Article 1015 of the Civil Procedure Code, Article 620, paragraph 2, of the same Code is applied. In view of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Articles L. 644-1 and L. 645-2 of the Social Security Code, Article 2 of Executive Order No. 49-579 of 22 April 1949, as amended, relating to the supplementary old-age pension scheme for doctors, and Article 2 of Executive Order No. 72-968 of 27 October 1972, as amended, aimed at making the supplementary old-age benefits scheme for contracted doctors compulsory:
10. Since a decision of 17 January 2007 (Second Civil Chamber, 17 January 2007, appeal no. 04-30.797, Bull. 2007, II, no. 6), the *Cour de cassation* (Court of cassation) considers that if the judgment of closure for deficiency of assets does not lead to the extinction of debts, it prohibits creditors from exercising their individual actions against the debtor, so that the absence of full payment of previous contributions does not deprive the insured or his beneficiaries of any right to benefits, but only has the effect of excluding the period during which contributions were not paid from the calculation of the amount of benefits.
11. The *Cour de cassation* (Court of cassation) also ruled, in a ruling of 26 November 2020 (Second Civil Chamber, 26 November 2020, appeal no. 19-21.207, in the process of publication), that it follows from the combination of the last four texts mentioned above, interpreted in the light of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, that, apart from the cases they refer to, the carry-over, each year, to the insured person's account of pension points under the supplementary old-age pension scheme for doctors and the supplementary old-age benefits scheme for contracted doctors is based exclusively on the payment, in full, of the annual contribution provided for each of these schemes, and cannot therefore be prorated according to the fraction of the annual contribution actually paid by the insured.
12. However, since then, the *Cour de cassation* (Court of cassation) has decided, in a ruling of 12 May 2021 (Second Civil Chamber, 12 May 2021, appeal no. 19-20.938, in the process of publication), that Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms implies, when a person is subject to compulsory membership of an essentially contributory pension scheme, a reasonable relationship of proportionality expressing a fair balance between the funding requirements of the pension scheme in question and the individual pension rights of contributors.
13. The re-examination of the above-mentioned legislative and regulatory provisions in the light of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms is consequently justified.
14. The individual right to a pension constitutes a substantial property interest falling within the scope of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
15. Articles L. 644-1 of the Social Security Code and 2 of the Executive Order of 22 April 1949, as amended, relating to the supplementary old-age pension scheme for doctors, on the one hand, and Articles L. 645-2 of the Social Security Code and 2 of the Executive Order of 27 October 1972, as amended, which make the supplementary old-age benefits scheme for contracted doctors compulsory, on the other hand, which provide that, apart from the cases to which they refer, only full payment of the annual contribution due under each of these schemes gives entitlement to the allocation of pension points, constitute an interference with the property rights of insured persons affiliated to these schemes, in that they affect the substance of their pension rights, by depriving them of all the points relating to the years for which they have not paid the full amount of their contributions.
16. This interference is based on legal and regulatory provisions of domestic law that are accessible, precise and foreseeable, and pursues a general interest motive insofar as it contributes to the financial equilibrium of the pension schemes concerned.
17. However, for the determination of the rights of an insured person who is the subject of Court-decided winding up proceedings closed for deficiency of assets, under these essentially contributory schemes, *excluding years wherein*

contributions were not paid in full, without taking partial payments into account, while contributing to the financial stability of these schemes, unduly infringes the basic guaranteed right in view of its intended purpose, and does not strike a fair balance between the competing interests.

18. Consequently, the application of Articles L. 644-1 of the Social Security Code and 2 of the Executive Order of 22 April 1949 as amended relating to the supplementary old-age pension scheme for doctors, on the one hand, Articles L. 645-2 of the Social Security Code and Article 2 of the Decree of 27 October 1972, as amended, designed to make compulsory the supplementary old-age benefits scheme for contracted doctors, on the other, insofar as they provide that, apart from the cases to which they refer, only full payment of the annual contribution due under each of these schemes gives entitlement to the award of retirement points, must be dismissed.

19. In order to allow the insured person's appeal, the ruling notes that the latter, having been the subject of a judicial liquidation by judgment of 22 April 2013, closed for lack of assets, during which the fund declared its claim consisting of contributions still due for the financial years 2003 to 2011, partially paid his contributions under the two schemes mentioned above during this period. It states that if the judgment of closure for lack of assets does not lead to the extinction of debts, it prohibits creditors from exercising their individual actions against the debtor, so that the absence of full payment of previous contributions does not deprive the insured or the insured's beneficiaries of any right to benefits, but only has the effect of excluding the period during which contributions were not paid from the calculation of the amount of benefits.

20. The ruling held that the number of points may be allocated, in accordance with Article 19, Section 2 of the supplementary old-age pension scheme, on a pro rata basis, rounded to the nearest hundredth of a point, when the contribution is lower than the income ceiling set in the Section 1 of Article 2 of the Executive Order of 22 April 1949, and orders the fund to proceed with the payment of benefits under this scheme to the insured person by applying, for partially paid annual contributions, a number of points proportional to the amount due for the year in question.

21. It also orders the fund to proceed with the settlement of the supplementary old-age allowance on the basis of 91 quarters of contributions pursuant to Article 10 of this scheme.

22. In so ruling, the *cour d'appel* (Court of Appeal) violated the above-mentioned texts.

ON THESE GROUNDS, without it being necessary to rule on the plea of the cross-appeal, the Court:

DISMISSES the main appeal;

QUASHES AND SETS ASIDE, except insofar as it declares Mr Cottet's claims admissible and dismisses his claims for damages, the ruling of the *cour d'appel* (Court of Appeal) of Bordeaux of 13 May 2020, between the parties;

Returns, except on these points, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Paris.

President : Mr Pireyre

Reporting Judge : Ms Vigneras, Judge Referee

First Advocate-General : Mr Gaillardot

Lawyer(s) : SCP L. Poulet-Odent – SCP Foussard et Froger

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