JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
13 July 1995

Case T-545/93

Heinz Kschwendt
v
Commission of the European Communities

(Officials – Dependent child allowance – Education allowance – Medical expenses – Recovery of sums unduly paid)

Application for: annulment of the decisions of the Commission of 3 February 1993, 29 March 1993 and 21 June 1993 declaring the applicant not to be entitled to certain benefits for his daughter and ordering the recovery of sums unduly paid.

Decision: Application dismissed.

Abstract of the Judgment

From 1986 to 1992, the applicant, a Grade A 4 official, received a dependent child allowance, an education allowance and an annual flat-rate payment of the cost of travel between his place of employment and place of origin for his daughter, Karin. As a dependent child, Karin Kschwendt was affiliated to the Sickness Insurance

Scheme common to the institutions of the European Communities ('the Joint Sickness Insurance Scheme').

She has been enrolled as a chemistry student at the University of Kaiserslautern since 1 October 1986. She also plays professional tennis at a high level.

Since the applicant failed to produce documents relating to his daughter's income and education, the Commission suspended the payment of both allowances and the refund of his daughter's medical expenses.

By a first decision of 3 February 1993, the Commission withdrew the education allowance with effect from 1 August 1986 and the dependent child allowance with effect from 1 October 1986 on the ground that Karin Kschwendt had never satisfied the conditions for those allowances to be granted.

The second decision of 3 February 1993 required the applicant to repay the sums unduly paid for the entirety of both allowances paid from 1986 to 1992. The applicant was also informed that his daughter was no longer covered by the Joint Sickness Insurance Scheme and a decision of 29 March required repayment of refunded medical expenses with effect from 1 October 1987.

A decision of 21 June 1993 required the applicant to repay the sums paid from 1987 to 1991 in respect of refunds for his daughter's annual travel costs.

The complaint submitted on 21 April 1993 by the applicant was rejected.

The admissibility of the pleas in support of the annulment of the decision of 21 June 1993

Since the admissibility of actions is a matter of public policy, the Court may raise of its own motion the question of inadmissibility of pleas which, in breach of Article 91(2) of the Staff Regulations, were not previously submitted to the appointing authority (paragraph 26).

See: T-130/89 *B* v *Commission* [1990] ECR II-761, para. 13; T-1/91 *Della Pietra* v *Commission* [1992] ECR II-2145; T-4/92 *Vardakas* v *Commission* [1993] ECR II-357

Since the decision of 21 June 1993 was made after the complaint was lodged, there was no pre-litigation procedure. The Court considers nevertheless that it is appropriate to determine whether the pleas in support of the annulment of that decision may be considered as having the same subject-matter as the claims set out in the complaint (paragraph 27).

An official may not submit to the Court pleas based on matters other than those relied on in the complaint. The submissions and arguments made to the Court in support of those pleas need not necessarily appear in the complaint, but must be closely linked to it. It follows that although Articles 90 and 91 of the Staff Regulations are designed to permit, by the lodging of a prior administrative complaint, the amicable settlement of disputes which have arisen between officials and the administration, it is not the purpose of those provisions to bind strictly and absolutely the contentious stage of the proceedings, provided that the application to the Court changes neither the legal basis nor the subject-matter of the dispute. The application to the Court may thus include claims other than those made in the complaint (paragraphs 29 and 30).

See: 224/87 *Koutchoumoff* v *Commission* [1989] ECR 99, para. 10; 126/87 *Del Plato* v *Commission* [1989] ECR 643, para. 12; *Vardakas*, cited above; T-15/93 *Vienne* v *Parliament* [1993] ECR II-1327

However, that case-law does not allow the applicant to change the subject-matter of his claim at the stage of the application to the Court. By requesting in his action the annulment of the decision of 21 June 1993 ordering the recovery of sums considered unduly paid for his daughter's annual travel costs, the applicant has clearly extended the subject-matter of the claim made in his complaint. It follows that the pleas in support of the annulment of that decision cannot be regarded as logically and directly linked to the claims relied on by the applicant in his complaint to the appointing authority. Since those pleas were not preceded by a pre-litigation procedure they are inadmissible (paragraphs 31 and 32).

The substance

The pleas in support of the annulment of the first decision of 3 February 1993 to withdraw the education allowance and the dependent child allowance

(a) The lawfulness of the first decision of 3 February 1993 in so far as it withdraws the education allowance

– The plea that the condition concerning regular full-time attendance at an educational establishment within the meaning of Article 3 of Annex VII has been satisfied

The Court points out first of all that in order to receive an education allowance, the child in respect of whom it is claimed must not only follow a course in an educational establishment but must also be in regular full-time attendance at that establishment. Furthermore, the student concerned must actually follow the programme of instruction laid down by the rules of the educational establishment attended (paragraph 49).

See: C-145/90 P *Costacurta* v *Commission* [1991] ECR I-5449, para. 6; T-34/89 and T-67/89 *Costacurta* v *Commission* [1990] ECR II-93, para. 26; T-86/91 *Wery* v *Parliament* [1993] ECR II-45, para. 50

However, it is apparent from the documents before the Court that Karen Kschwendt's career as a professional tennis player made it physically impossible for her to put in regular full-time attendance at the courses given by the Chemistry Faculty of the University of Kaiserslautern since 1 October 1986. The mere fact that that establishment provides courses for which the teaching hours are more than those required by Opinion 166/87 adopted by the board of the heads of administration for the purposes of interpreting Article 3 of Annex VII to the Staff Regulations, that is to say at least 16 hours of lectures and/or practical work weekly does not affect the findings of the Court since the applicant has also failed to prove that his daughter regularly attended university during the years in dispute even for the minimum number of hours laid down by Opinion 166/87 (paragraphs 50 and 57).

(b) The lawfulness of the first decision of 3 February 1993 in so far as it withdraws the dependent child allowance

– The plea that the condition as to educational or vocational training within the meaning of Article 2(3) of Annex VII was satisfied

The Court points out first of all that Opinion 176/87 of the board of the heads of administration considers that the condition that the child receives 'educational training' is automatically satisfied where the educational establishment attended provides at least ten hours of lectures and/or practical work weekly to the pupil or student concerned (paragraph 67).

Although it is not bound by that, the Court considers that in the circumstances of this case that Opinion correctly and reasonably implements the provisions of the Staff Regulations in issue (paragraph 68).

Since the dependent child allowance provided for a child receiving educational or vocational training is, in the words of the Staff Regulations, 'granted on application, with supporting evidence, by the official', it follows that it is for the official to adduce the requisite evidence in this respect. However, the applicant did not prove that his daughter actually attended, albeit intermittently, the lectures provided by the Chemistry Faculty of the University of Kaiserslautern even for the minimum hours laid down by Opinion 166/87. Consequently, she cannot be regarded as having received educational or vocational training within the meaning of Article 2(3) of the abovementioned Annex (paragraphs 69 and 70).

– The plea concerning the income of the applicant's daughter, relied upon in order to challenge the first decision of 3 February 1993 in so far as it withdraws the dependent child allowance.

The Court points out first of all that an official is only entitled to a dependent child allowance in so far as the child is actually maintained by him and that it is for the official to adduce evidence as to the child's status as a dependent child (paragraph 81).

Although it is not bound by Opinion 188/89 interpreting Article 2(2) of Annex VII, the Court notes that that Opinion is right in referring to the income of the child ascertained after deduction of social security contributions and prior to deduction of tax, without taking into account the professional expenses submitted by the applicant, in order to determine the term 'dependent child' (paragraph 83).

In this respect, the Court finds that the total income earned from 1989 to 1993 by Karin Kschwendt by reason of her sporting activities is much higher than the maximum amounts of income laid down by Opinion 188/89. In any event, it is apparent from the documents before the Court that the professional expenses which

the applicant contends his daughter may incur as a professional tennis player have never been proved by the applicant (paragraphs 84 and 85).

It follows that Karin Kschwendt cannot be considered, at least as from 1989, as having been actually maintained by the applicant and that the applicant was therefore not entitled, in any event, to receive any dependent child allowance for his daughter as from that date (paragraph 87).

– The plea concerning the non-affiliation of the applicant's daughter to a national sickness insurance scheme

The Court rejects the applicant's argument that, even if his daughter's income was more than the maximum set by the Staff Regulations, he is entitled to rely on the provision in Opinion 188/89 to the effect that 'the child shall be considered as remaining dependent on the official where he or she is not covered by a national sickness insurance scheme', which was Karin Kschwendt's case until 1 September 1993 (paragraph 95).

In this regard, the Court simply notes that since Karin Kschwendt could no longer be considered as a dependent child of an official as from 1 October 1986, she was no longer entitled to be covered against sickness risks by the Joint Sickness Insurance Scheme, the benefit of which is explicitly reserved for the dependent children of officials (paragraph 92).

Accordingly, even if Karin Kschwendt's non-affiliation to a national sickness insurance scheme were proved, such non-affiliation directly follows from the fact that she wrongly remained affiliated to the Joint Sickness Insurance Scheme as a result of the applicant's conduct. The applicant is not, therefore, able to rely upon his own failure to comply with duties under the Staff Regulations (paragraph 94).

The pleas in support of the annulment of the decisions of 3 February and 29 March 1993 concerning the repayment of the allowances and benefits considered as having been unduly paid to the applicant

The plea that the irregularity vitiating the payments in issue was not so patent that the applicant could not have been unaware of it

The Court points out that the condition concerning the patent nature of the irregularity of the payment is satisfied where the irregularity in issue should not have escaped the notice of an official exercising ordinary care. For that purpose, the Court of Justice and the Court of First Instance take into account in each case the ability of the official concerned to make the necessary checks. The factors taken into consideration by the Community judicature in this regard concern the official's level of responsibility, his or her grade and seniority, the degree of clarity of the provisions of the Staff Regulations setting out the conditions for the grant of the allowance and the significance of the changes in his or her personal or family circumstances, where payment of the sum in issue is linked to an assessment of such circumstances by the administration (paragraphs 103 and 104).

See: 251/78 *Broe* v *Commission* [1979] ECR 2393; 310/87 *Stempels* v *Commission* [1989] ECR 43; T-34/89 and T-67/89 *Costacurta* v *Commission* [1990] ECR II-93; T-117/90 *Sens* v *Commission* [1990] ECR II-185; T-124/89 *Kormeier* v *Commission* [1991] ECR II-125; T-38/93 *Stahlschmidt* v *Parliament* [1994] ECR-SC II-227

In this case, the Court considers that the applicant has not shown the ordinary degree of care required. He could not have been unaware of the fact that the sporting activities of his daughter were clearly incompatible with regular and full-time attendance as a chemistry student at the University of Kaiserslautern. In this respect, the Court points out that the applicant himself realised that the payments of the allowances and benefits in dispute were irregular as from September 1991, without however notifying the administration accordingly and that he must have already been aware of such irregularity as from 1 October 1986. The applicant could also no longer have been unaware that as a result of the clear provisions of Article 72(1) of the Staff Regulations his daughter could no longer be covered by

the Joint Sickness Insurance Scheme as from that latter date (paragraphs 105, 106 and 107).

Furthermore, it is common ground that Karin Kschwendt earned sums of money of which the smallest was far greater than the maximum set by the Staff Regulations. In addition, the applicant does not deny that he never informed his institution of the changes in his daughter's circumstances, even though such changes were manifestly liable to affect his entitlement to the allowances and benefits in dispute (paragraphs 108 and 109).

Even if the provisions of the Staff Regulations were ambiguous and the applicant was unaware of the Opinion of the heads of administration interpreting those provisions, in the absence of his daughter's regular and full-time attendance at an educational establishment and in the absence of her undertaking educational or vocational training, the applicant could not have failed to realise from the outset that he was not entitled to the allowances and benefits in dispute (paragraph 110).

More generally, it follows from the factual evidence put before the Court by the defendant, the accuracy of which is not disputed by the applicant, that the irregularity of the payments in issue was so patent that he could not have been unaware of it (paragraph 111).

Costs

The Court orders the applicant to pay the whole of the costs in view of the fact that the action is manifestly an abuse. The applicant, who does not deny that the burden of proof rests with him, never submitted the slightest evidence of fact to substantiate his contentions during the pre-litigation stage or litigation stage of the procedure, even though some of that evidence was in his possession or could have been

produced by him. The applicant did not even attempt to challenge the validity of a large number of precise and concordant figures gathered, after considerable work, by the Commission's staff concerning the activities of his daughter as a professional tennis player and her income (paragraph 119).

The Court holds, furthermore, that the applicant expressly acknowledged that his daughter could neither be considered as attending, regularly and full-time, an educational establishment, nor as receiving educational or vocational training, for the period following September 1991. However, on 23 September 1991, the applicant nevertheless submitted an application to the Commission's staff for education and dependent child allowances for 1991/92 despite the fact that by memorandum of 29 August 1991, the Commission had questioned him about his daughter's income and had notified him that the two allowances in question would henceforth be paid to him provisionally (paragraph 121).

Operative part:

1. The application is dismissed.

2. The applicant is ordered to pay all of the costs.