

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
28 February 1991 *

In Case T-124/89,

Eberhard Kormeier, an official at the Commission of the European Communities, residing at Everberg (Belgium), represented by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 11 November 1988 to deduct overpayments of allowances for dependent children from the applicant's salary and for an order requiring the Commission to reimburse to the applicant all sums already deducted, together with interest,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: C. P. Briët, President, H. Kirschner and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 11 October 1990,

gives the following

* Language of the case: French.

Judgment

Facts and procedure

- 1 The applicant, who was recruited in 1960, was during the material period attached to the cabinet of Mr Narjes, a vice-president of the Commission of the European Communities, as a principal assistant in Grade B 1, Step 8.
- 2 Until 31 October 1986, the applicant received in respect of his three children the allowance for dependent children provided for by Article 2 of Annex VII to the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') and the education allowance provided for by Article 3 of that Annex. On 3 October 1986, Division IX. B.1, 'Financial and Administrative Rights', of the Commission's Directorate-General for Personnel and Administration notified him that as from 1 November 1986 he would cease to be entitled to those allowances in respect of his son, Michael, born on 18 October 1960.
- 3 By a note of 15 October 1986 the applicant acknowledged receipt of that notification. After pointing out that as from 1 December 1986 he would also cease to benefit from the same allowances for his son Dirk, born on 25 November 1960, the applicant requested the tax abatement for a dependent child provided for by the second paragraph of Article 3(4) of Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (OJ, English Special Edition 1968 (I), p. 37). By a note of 18 November 1986 the administration informed him that his request would be granted in respect of his son Michael as from 1 November 1986 and in respect of his son Dirk as from 1 December 1986.
- 4 The administration inadvertently continued to pay to the applicant the dependent child allowance for his son Dirk after 1 December 1986. As soon as the error was detected, the Commission took the decision — notified to the applicant by a note of 11 November 1988 — to recover the sums overpaid totalling BFR 238 649 by deducting from the applicant's salary for December 1988 an amount of BFR 13 649 and thereafter an amount of BFR 15 000 from his salary for each following month, up to and including March 1990.

- 5 By a letter of 23 November 1988, received on 28 November 1988, the applicant lodged a complaint under Article 90(2) of the Staff Regulations. On 22 March 1989 the Commission rejected that complaint by a decision which was brought to the applicant's notice on 11 April 1989.

- 6 By an application received at the Court Registry on 10 July 1989 the applicant brought this action.

- 7 After the defence had been lodged, the Court of Justice, by order of 15 November 1989, referred the case to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

- 8 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

- 9 The hearing took place on 11 October 1990. The parties' representatives made oral submissions and answered questions put to them by the Court.

- 10 The applicant claims that the Court should:
 - (i) declare the Commission's decision of 11 November 1988 null and void;
 - (ii) order the Commission to repay to him all the sums already deducted;
 - (iii) order the Commission to pay to him interest on those sums at the rate of 8%, calculated as from the date on which they were deducted from his pay;

(iv) order the defendant to pay the costs of the proceedings.

11 The Commission contends that the Court should:

(i) dismiss the application;

(ii) make an appropriate order as to costs.

Substance

12 In support of his application the applicant relies on a single plea in law alleging disregard of Article 85 of the Staff Regulations on which the contested decision is based. Referring in particular to the judgment of the Court of Justice in Case 142/78 *Berghmans v Commission* [1979] ECR 3125, he argues that that provision, which lays down the principle that any sum overpaid is to be recovered, is not applicable if the official concerned could not have been aware of the error. In this regard he states that in January 1987, after noticing that his salary statements frequently changed, he had a telephone conversation with an official responsible for salaries, to whom he sent a photocopy of his salary statement for January 1987 accompanied by a note stating that he no longer understood his salary statements and expressing the wish that they would be more coherent in future.

13 With particular reference to the judgment of the Court of Justice in Case 71/72 *Kubl v Council* [1973] ECR 705, the judgment in Case 252/78 *Broe v Commission* [1979] ECR 2393 and the judgment in Case 310/87 *Stempels v Commission* [1989] ECR 43, the applicant submits that, in order to determine whether or not there was an error that could not escape the notice of an official exercising ordinary care, account must be taken not only of the rank of the official concerned but also of his ability to make the necessary checks. He argues that the judgment in Case 310/87 *Stempels*, cited above, in which the Court of Justice held that an error made by the administration concerning a salary item could not have escaped the applicant's notice, cannot be set up against him. Unlike the official concerned in that case, he has no special knowledge of financial matters. Finally, he submits that, according to the judgment in *Berghmans*, cited above, and the judgment in

Case 36/72 *Meganck v Commission* [1973] ECR 527, account must be taken, where appropriate, of the good faith of the official concerned, who may keep the amounts paid which the administration is no longer entitled to recover in such a case.

- 14 The Commission submits that the applicant was well aware that there was no due reason for the payments he received and that in any case the lack of due reason was so obvious that he could not have been unaware of it. It points out in particular that the amount of the dependent child allowance is fixed by Council regulation as part of the annual adjustment of officials' pay and that the relevant provisions, published in the Official Journal, were sent to each official in his own language. Given the fact that the applicant knew that he was entitled to only one dependent child allowance, a simple reading of his salary statements would, particularly in view of his rank and seniority, have enabled him to understand the variations in the amounts paid to him as dependent child allowance and to see that there was no due reason for those payments.
- 15 Faced with this dispute, the Court of First Instance would point out that Article 85 of the Staff Regulations provides that: 'Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.'
- 16 It is clear from the documents provided by the applicant, in particular the note sent to him on 3 October 1986 by the 'Financial and Administrative Rights' Division and the note he sent in reply to that division on 15 October 1986, that he must have been aware that he ceased to be entitled to the dependent child allowance for his children Michael and Dirk as from 1 November and 1 December 1986 respectively.
- 17 The applicant has not contested the Commission's statement that during the period in question the provisions periodically adjusting the amount of the dependent child allowance, published in the Official Journal, were sent to each official in his own language. It is also clear from an examination of the applicant's salary statements

produced by him that they clearly specify the amounts paid as dependent child allowance. Those circumstances are sufficient to establish that the applicant, who was informed of the exact amount of the allowance in question and whose character as an official exercising ordinary care is not cast in doubt by any document in the case-file, could not have been unaware that there was no due reason for the payments which he unduly received.

18 It is also necessary to bear in mind that, according to the consistent case-law of the Court of Justice (judgments in *Kuhl*, *Broe* and *Stempels*, cited above), it is necessary to take into account in each case the ability of the official concerned to make the necessary checks. In the present case, given the nature of the applicant's duties, his long career at the Commission and the content of his staff reports which he has furnished to the Court, there is no doubt that the applicant was quite capable not only of noticing the substantial difference between the amounts received by way of dependent child allowance and those to which he was entitled but also of carrying out a check which would have made the situation entirely clear to him.

19 The Court of First Instance also considers that the telephone conversation which the applicant claims, without being contradicted by the Commission, to have had with an official responsible for administering salaries at the Commission, as well as the sending of a photocopy of his salary statement for the month of January 1987 accompanied by a note stating that he found his salary statements incomprehensible, rather tend to strengthen the view that he could have noticed that there was an error in the salary statements. In any event, such conduct cannot constitute proof of the good faith on which the applicant relies when the note in question made no mention at all of the difficulties in calculating the dependent child allowance and, moreover, the applicant has not proved or even alleged that the administration reacted to his step by providing him with an explanation to dispel his doubts about the correctness of his salary statements.

20 It follows from all the foregoing that the application must be dismissed.

Costs

- 21 Under Article 69 of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the procedure before the Court of First Instance, the unsuccessful party must be ordered to pay the costs if these have been applied for in the successful party's pleadings.

However, according to Article 70 of the same rules, in actions brought by officials of the European Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Briët

Kirschner

Biancarelli

Delivered in open court in Luxembourg on 28 February 1991.

H. Jung
Registrar

C. P. Briët
President