JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
7 February 1991 *

In Case T-167/89,

Jan Robert de Rijk, an official of the Commission of the European Communities residing at Tervuren (Belgium), represented by Jean-Nöel Louis of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson S.à r. l., 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by J. Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 17 February 1989 to recalculate, pursuant to Article 67(2) of the Staff Regulations of Officials of the European Communities, the remuneration paid to the applicant during the period from October 1987 to February 1989,

THE COURT OF FIRST INSTANCE (Third Chamber),

composed of: A. Saggio, President, B. Vesterdorf and K. Lenaerts, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 17 January 1991,

gives the following

* Language of the case: French.

Judgment

The facts of the case

1 The applicant is an official of Netherlands nationality employed by the Commission in Brussels. He is the father of two children for whom he receives dependent child allowances and education allowances provided for by Article 67 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as the 'Staff Regulations') and Articles 2 and 3 of Annex VII to the Staff Regulations. After the eldest child began higher education in the Netherlands in the summer of 1987, the education allowance for that child was doubled in accordance with the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations.

2 The applicant subsequently declared that from October 1987 his son was receiving a study grant ('basisbeurs') under Netherlands law. Consequently, in accordance with Article 67(2) of the Staff Regulations, the administration decided to deduct from the amount of the family allowances previously paid to him under the Staff Regulations a sum corresponding to the amount of the 'allowances of like nature paid from other sources', that amount being the 'basisbeurs' (HFL 605.40 per month). The sums so received were converted into Belgian francs at successive exchange rates as provided for in Article 63 of the Staff Regulations and a coefficient equal to the ratio between the weighting for Belgium (the official's place of employment) and the weighting for the Netherlands in force for each month in question was applied to them. On that basis the appointing authority proceeded, pursuant to the contested decision of 17 February 1989, to pay the amounts subject to deduction.

3 As the contested decision indicated, the sum of BFR 191 614 to be recovered was subsequently deducted from the applicant's salary in six instalments of BFR 30 000 spread over the period from April to September 1989 and a final instalment of BFR 11 614 due in October 1989.

4 By written complaint dated 16 May 1989, the applicant contested the method of calculating the sums to be repaid on the ground that the application to them of the weighting for the Netherlands was unlawful.

5 In the absence of a reply from the administration, the applicant's complaint was impliedly rejected on 16 September 1989.

Procedure

6 It was in those circumstances that by an application lodged at the Court Registry on 18 December 1989 and registered the following day the applicant brought the present proceedings before the Court of First Instance. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

7 Nevertheless, by a letter from its Registrar of 19 December 1990, the Court of First Instance requested the Commission to reply in writing, by 5 January 1991, to five questions about its administrative practice and that of the other Institutions concerning the application of Article 67(2) of the Staff Regulations.

8 By a letter lodged at the Court Registry on 4 January 1991 and registered on 7 January 1991 the Commission replied to the questions asked by the Court of First Instance.

9 The oral procedure took place on 17 January 1991. The representatives of the parties presented oral argument and replied to questions from the Court of First Instance.

Forms of order sought by the parties

10 The applicant claims that the Court of First Instance should:

(i) declare the action admissible and well founded;

(ii) consequently, annul the Commission's decision of 17 February 1989 to recalculate the remuneration paid to the applicant during the period from October 1987 to February 1989;

(iii) annul so far as necessary the Commission's implied decision rejecting the complaint which he made on 16 May 1989;

(iv) order the defendant to pay the costs.

The Commission contends that the Court of First Instance should:

(i) dismiss the application as unfounded;

(ii) make an appropriate order as to costs.

Admissibility of the action

11 In its rejoinder, the Commission argues that the applicant's plea of a breach of Article 67(2) of the Staff Regulations is inadmissible on the ground that it was introduced for the first time at the reply stage and therefore constitutes a new plea in law within the meaning of Article 42(2) of the Rules of Procedure of the Court of Justice. The Commission contends that, unlike the appeal lodged prior to legal proceedings and the reply, the application was based exclusively on a breach of Article 67(4) of the Staff Regulations.

12 The Court notes that the plea of inadmissibility raised by the Commission misconstrues the tenor of the arguments set out in the application; the first plea alleges a breach of Article 67 of the Staff Regulations considered as a whole and refers to 'Article 67(2)' as the 'legal context of the dispute'. The applicant's reference to Article 67(4) of the Staff Regulations is made only in order to dispute its applicability in the present case in so far as the Community family allowances are paid to him and not to another person.

13 The plea of inadmissibility must accordingly be rejected.

The substance of the case

14 In support of his application the applicant makes two partially overlapping pleas in law alleging, first, a breach of Article 67 of the Staff Regulations and, secondly, a breach of the principles of equal treatment of officials and of sound administration.

15 The applicant's first plea in law is that there is no basis in any provision of the Staff Regulations to apply to the amount of the 'basisbeurs' falling to be deducted from his dependent child allowances and education allowances a coefficient taking into account the weighting for the Netherlands. Article 67(2) of the Staff Regulations, pursuant to which the amount of the 'basisbeurs' was deducted does not provide in any way that the amounts to be deducted as allowances of like nature to family allowance are to be subjected to any coefficient. According to the applicant, it follows from the fact that the provision is silent on this matter that in the present case the general rule laid down in the first paragraph of Article 64 of the Staff Regulations should be applied instead. According to that provision, an official's remuneration, which includes family allowances by virtue of Article 62 of the Staff Regulations, is weighted, depending on living conditions in the various places of employment. The applicant argues that it follows that the various provisions of the Staff Regulations providing for the application of a different weighting from the one for the place of employment constitute exceptions to the general rule and must accordingly be interpreted restrictively. Moreover, the existence of such exceptions shows, according to the applicant, that each time the Community legislature has wished to derogate from the general rule it has done so explicitly.

16 In his second plea in law, the applicant further argues that he has suffered discrimination in relation to officials who do not receive a national allowance of like nature to a family allowance in so far as those officials do not have any weighting applied to the part of the Community allowances corresponding to the national allowance, even when it is established that their child studies in another Member State.

17 The Commission admits that Article 67(2) of the Staff Regulations does not expressly provide for the application to the amount of the national allowances which are of like nature to the Community family allowances and which fall to be deducted from the Community allowances of a weighting that takes account of the

weighting for the country where the allowances are paid and spent. It points out, however, that Article 67(2) likewise does not prohibit the application of such a weighting to those sums. It is for that reason that it considers that it was entitled to base its decision on Article 67(2) of the Staff Regulations, interpreted in accordance with the principle that, no matter where their place of employment, officials should be treated equally, that principle constituting a superior principle of law governing the Community civil service (Case 156/78 *Newth* v *Commission* [1979] ECR 1941). In this regard, the Commission observes that, according to the case law of the Court of Justice (judgment in Case 156/78, cited above, and judgment in Case 75/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509), the administration must allow that principle to override clear and explicit provisions of the Staff Regulations when they lead to discriminatory results: *a fortiori*, the position must be the same when the administration is confronted with a neutral text capable of two interpretations, one consonant with the principle of equal treatment and the other contrary to that principle.

18 The Commission further contends that the existence of provisions in the Staff Regulations explicitly providing for the application of a coefficient different from the weighting for the place of employment is proof of the existence of a superior principle of equal treatment in the law governing the Community civil service.

19 The Commission maintains that, if it did not apply the weighting to which the applicant objects, it would fail to observe the principle of equal treatment, conceived in terms of real purchasing power, between officials having different places of employment. In its written reply to the questions from the Court, the Commission stated that the weighting applied is nothing other than the 'transfer rate' used for the purpose of transfers of part of an official's remuneration from the country where he is employed, as provided for by Article 17(3) of Annex VII to the Staff Regulations. According to the Commission, since all allowances are regarded as taking account of the cost of living in the country where they are paid, as reflected by the weighting for that country, it is appropriate, in order to maintain equal treatment conceived in terms of the purchasing power actually provided by the allowance at the place where it is spent, to apply the 'transfer rate' coefficient, which enables the purchasing power provided by a particular allowance at a place other than the place of employment to be converted in terms of the purchasing power provided at the place of employment.

20 The Commission observes that if in this case it had not applied the 'transfer rate' coefficient to the 'basisbeurs' received in the Netherlands by the son of the applicant employed in Brussels, so as to take account of the purchasing power provided in the Netherlands by that allowance, discrimination in terms of purchasing power would have been created between the applicant who spends his allowance in a country in which the cost of living is low and, for example, a Danish official whose son receives and spends in Denmark (for which the weighting in force at that time was 129.2) an allowance of the same amount.

21 The Commission consequently considers that the method applied in the contested decision enables equal treatment between officials to be fully safeguarded irrespective of their place of employment and of the place where their children study and receive national allowances.

22 Furthermore, the Commission maintains that the discrimination alleged by the applicant as his second plea is not discrimination. The applicant who receives a national allowance is not in a situation identical or comparable to that of officials not receiving a national allowance so as to allow him to claim equal treatment. Furthermore, that difference in the factual situation between those two categories of officials is not attributable to the Commission but to officials who do not claim the national allowances to which they are entitled or else to Member States which have not introduced allowances of this kind. At the hearing, the Commission stated that the method applied to the applicant was not apt to create discrimination between officials receiving a national allowance and officials not receiving a national allowance, since the latter officials, who receive full Community allowances, can take advantage of the 'transfer rate' provided for by Article 17(3) of Annex VII to the Staff Regulations, which allows them to adapt the amount of their Community allowances to the cost of living at the place where the allowances are spent by their children.

23 It must be recalled first of all that, according to the case-law of the Court of Justice (see the judgment in Case 156/78 *Newth* v *Commission*, cited above, paragraph 13), if the application of a provision of the Staff Regulations is likely to result in the breach of a superior rule of law, that provision must be interpreted to mean that the appointing authority is obliged, in order to avoid such a result, not to apply it. Consequently, it is necessary to examine whether, in the absence of a

provision in the Staff Regulations to this effect, observance of the superior principle of equal treatment required a coefficient corresponding to the 'transfer rate' provided for in Article 17(3) of Annex VII to the Staff Regulations to be applied to the amount of the national allowance of a nature like the Community family allowances and subject to deduction under Article 67(2) of the Staff Regulations, the question is therefore whether the method applied by the Commission leads in all cases to equal treatment as the Commission contends.

24 The Court finds that the method applied by the Commission enables equal treatment conceived in terms of purchasing power to be maintained between all officials, whether or not they receive a national allowance, provided that the weighting for the place of employment is lower than the weighting for the place where the allowance is spent. In that case, the Commission's method is favourable to officials receiving a national allowance of a nature like the Community family allowances, since, as it is spent in a country in which the cost of living is higher than at the place of employment, the national allowance provides less purchasing power than at the place of employment, with the result that the sum to be deducted from the Community allowances will be lower than the nominal amount of the national allowance received. As for officials not receiving a national allowance of like nature, they will use the 'transfer rate' facility provided for in Article 17 of Annex VII to the Staff Regulations, as the Commission pointed out at the hearing, which will enable them to obtain payment, at the place where their child is studying, of the Community allowance, which will be increased so as to take account of the higher cost of living than at the place of employment.

25 Thus, an official employed in Belgium (for which the weighting is 100) receiving and spending in Denmark (for which the weighting in force at the relevant time was 129.2) an allowance of like nature to family allowances amounting to ECU 250 will have ECU 193.49845 deducted (250 x (100:129.2)), whereas if he had not received a national allowance of like nature, he would have had that sum at his disposal and would have transferred it from Belgium to Denmark using the 'transfer rate' facility, which would have allowed him to receive a sum of ECU 250 (193.49845 x (129.2:100)), corresponding to the amount of the national allowance.

26 However, in a case like Mr Rijk's, as the Commission admitted at the hearing, the method it applied does not maintain equal treatment — conceived in terms of the purchasing power actually made available — between officials receiving a national allowance of like nature and those not receiving such an allowance and, by extension, between officials who receive national allowances of a different amount, if the weighting for the place of employment is higher than the weighting for the place where the allowance is spent. In that case, the Commission's method is unfavourable to officials receiving a national allowance of like nature, since, as the national allowance is spent in a country in which the cost of living is not as high as at the place of employment, the national allowance secures there purchasing power greater than at the place of employment, with the result that the sum to be deducted from the Community allowances will be higher than the nominal amount of the national allowance received. On the other hand, officials who do not receive a national allowance and who therefore receive full unreduced Community allowances will be able to keep them in full. As the Commission admitted at the hearing, in the case of those officials, no coefficient other than that for their place of employment is applied, by reason of the purely optional nature of the 'transfer rate' mechanism provided for by Article 17 of Annex VII to the Staff Regulations. Because it is optional, officials do not have recourse to it unless the result is favourable to them, namely when the weighting for the place of employment is lower than the weighting for the place to which their money is transferred and at which it is spent.

27 Thus, in the case of an official like the applicant, employed in Belgium (for which the weighting is 100), receiving and spending in the Netherlands (for which the weighting is 91) an allowance, of like nature to family allowances, of ECU 250, there will be a deduction of ECU 274.72527 (250 x (100:91)) corresponding to the purchasing power secured at the place of employment by the national allowance paid in the Netherlands, whereas if he had not received the national allowance of like nature, he would have had that sum at his disposal in Belgium which he could have transferred by some means or other to the Netherlands without resorting to the optional 'transfer rate' mechanism, which would have allowed him to have at his disposal there a sum of ECU 274.72527, which is more than the sum of ECU 250 paid by way of national allowance. It is to be noted that in the latter case the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations does not take into consideration the place where the education allowance is spent in order to apply to the Community allowance a coefficient different from the weighting for the place of employment, even though it is established in law that that place is different from the place of employment.

28 Moreover, in purporting to be based on the principle of equal treatment, the Commission's method presupposes that the place of payment of the national allowance — of like nature to family allowances — is the same as the place at which it is spent. The Commission has admitted, however, in its written reply to the questions from the Court and at the hearing, that it does not abandon that assumption and continues to apply the 'transfer rate' coefficient, taking account of the weighting for the place of payment of the national allowance, even though it is established in law that it is not the same as the place at which it is spent.

29 Consequently, the Commission cannot rely upon the principle of equal treatment between officials, conceived in terms of the actual purchasing power provided by the national allowance, since it takes into consideration solely the place at which the national allowance is paid, irrespective of the place at which the allowance is spent and, therefore, irrespective of the purchasing power which it actually secures for officials.

30 Finally, it is important to state, albeit superfluously, that, as the Commission indicated in its written reply to a question from the Court, it has been applying the system contested by the applicant only since October 1987, and that, although the Court of Justice, the Parliament and the Court of Auditors apply the same method, this is not the case at the Council, which does not apply any weighting to national allowances of a nature like the Community family allowances, received in a Member State other than the country of employment.

31 It follows from all the foregoing considerations that in applying a coefficient corresponding to the 'transfer rate' provided for by Article 17(3) of Annex VII to the Staff Regulations the contested decision may not rely either on a provision of the Staff Regulations or on the higher legal principle of equal treatment. Consequently, the decision must be annulled without its being necessary to examine the other arguments advanced as part of the second plea in law made in support of the application.

Costs

32 Under Article 69(2) 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 is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has failed in its pleas in law, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

(1) Annuls the Commission decision;

(2) Orders the Commission to pay the costs.

Saggio Vesterdorf Lenaerts

Delivered in open court in Luxembourg on 7 February 1991.

H. Jung
Registrar

A. Saggio
President