JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
10 May 1990 *

In Case T-117/89

Paul F. Sens, a temporary employee of the Commission of the European Communities, residing in Brussels, represented by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 62, avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by J. Griesmar, Legal Adviser, and Sean van Raepenbusch, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 9 August 1988 to withhold from the applicant's salary the amounts wrongly paid as education allowance for the period from 1 October 1986 to 1 April 1988,

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber, C. Yeraris and K. Lenaerts, Judges,

Registrar: H. Jung

having regard to the written procedure and further to the hearing on 21 March 1990,

gives the following

* Language of the case: French.

Judgment

Facts and procedure

1 The applicant, Paul F. Sens, a Netherlands national, is a temporary employee of the Commission in Grade A 5. From 1 October 1986 to 1 April 1988 his daughter Monica, a student in the Netherlands, received an allowance called a 'basisbeurs' of HFL 605 per month under the Netherlands Law of 24 April 1986 on the financing of studies (Wet op de studiefinanciering', *Staatsblad* 1986, p. 252). According to the information in the documents before the Court the basisbeurs may be granted to all students in the Netherlands aged 18 to 30 and is intended to contribute to the financing of their studies. With effect from the entry into force of the Wet op de studiefinanciering it replaced the child allowance ('kinderbijslag') previously paid to parents.

2 During the abovementioned period and while his daughter was in receipt of the basisbeurs, the applicant was paid the education allowance by the Commission under Article 67(1) of the Staff Regulations of the European Communities, according to which family allowances under the regulations comprise the household allowance, the dependent child allowance and the education allowance. Article 67(2) provides that 'officials in receipt of family allowances . . . shall declare allowances of like nature paid from other sources; such latter allowances shall be deducted from those paid under Articles 1, 2 and 3 of Annex VII' (that is to say they are to be deducted from the household allowance, the dependent child allowance and the education allowance).

3 After the entry into force of the Wet op de studiefinanciering the applicant did not state on the application form for the education allowance that his daughter was in receipt of the basisbeurs, unlike other officials to whom the rule against overlapping was then applied. However, Mr Sens claims that he attached a cover slip ('fiche de transmission') to the form stating that his daughter was in receipt of a study grant under the Wet op de studiefinanciering. The Commission denies having received any document of that kind. After receiving a letter from the applicant dated 12 July 1988, following a notice published in the *Administrative Notices* of 6 June 1988 drawing officials' attention to their obligation to declare the basisbeurs, the Commission decided on 9 August 1988 to recover the undue payment pursuant to Article 85 of the Staff Regulations.

4 It was in those circumstances that the applicant, after exhausting the preliminary administrative procedure and within the time-limits laid down in Article 91(3) of the Staff Regulations, brought the present application for annulment of the decision of 9 August 1988.

Conclusions of the parties

5 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 9 August 1988 to deduct from the applicant's salary the sums alleged to have been wrongly paid as education allowance for the period from 1 October 1986 to 1 April 1988;

(iii) order the defendant to pay the costs.

The defendant contends that the Court of First Instance should:

(i) dismiss the application;

(ii) make an order for costs in accordance with the law.

Substance

6 In support of his application the applicant puts forward a single submission based on failure to apply Article 85 of the Staff Regulations, according to which '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.' He does not deny that the basisbeurs provided for by the Wet op de studiefinanciering is 'of the same nature as the dependent child allowance and the education allowance under the Staff Regulations' (point 3 of the part headed 'law' of his reply). He states that the new allowance replaces the 'kinderbijslag' which was previously paid to parents and in his particular case

simply supplemented the allowances provided for by the Staff Regulations, since the allowance provided for by the Netherlands law was more than that paid by the Commission. He therefore does not deny that there was undue payment of the education allowance during the period in question (1 October 1986 to 1 April 1988), but considers that neither of the two conditions in Article 85 justifying repayment was met in the present case. More specifically, he claims that he was not aware that there was no due reason for the payment and that the overpayment was not patently such that he could not have been unaware of it.

7 As regards the first condition, Mr Sens admits that he was aware of the fact that his daughter, as a student, had since 1 October 1986 been in receipt of a Netherlands allowance called the 'basisbeurs' (that is to say, literally translated, 'grant for basic needs'), but he alleges that he did not understand that the grant was intended to meet the same needs as those covered by the education and dependent child allowances paid to Community officials. He nevertheless claims to have informed the defendant of the payment in two covering notes ('papillons'), of which he produced photocopies, which he alleges he attached to the claim forms for the grant of the education allowance and forwarded with them to the administration in October 1986 and October 1987 respectively. He explains that he did not use the forms because they were inappropriate in so far as they related only to the education allowance. He adds that because of the novelty of the educational grant scheme introduced by the Wet op de studiefinanciering he was unable properly to classify the allowance without preliminary consideration. It was thus because of the absence of reaction on the part of the administration, which continued to pay the education allowance from 1 October 1986 to 1 April 1988 in spite of the information the applicant alleges he supplied in the two abovementioned covering notes, and the fact that the Commission did not, before the date of entry into force of the Wet op de studiefinanciering, expressly acknowledge that the basisbeurs and the allowances paid under Article 67 of the Staff Regulations were similar in nature that the applicant was not aware that there was no due reason for the payment.

8 The Commission, on the other hand, considers that the applicant was aware during the period in question that there was no due reason for the payment and that it is therefore entitled to recover the overpayment from the applicant pursuant to the rule set out in the first part of Article 85 of the Staff Regulations. It states that it did not receive the covering notes to which the applicant refers in order to establish that he was unaware that there was no due reason for the payment. That statement is corroborated, according to the Commission, both by the attitude of its administration, which during the period in question applied the rule against over-

lapping benefits under Article 67(2) of the Staff Regulations to 24 officials who had stated in their application for the education allowance that their children were in receipt of a Netherlands educational grant, and by the attitude of the applicant, who alleges he gave the information, which ought to have been in point 3 of the application, on a separate covering note to which there was no reference in the applications for grant of the education allowance. In addition even the wording of the covering notes, which state that the Netherlands educational grant replaces the family allowances previously paid direct to parents, is evidence that the applicant was aware that there was no due reason for the payment. The defendant infers from that that the applicant's claim that he was unaware that there was no due reason for the payment is not plausible.

9 The applicant challenges the Commission's argument from the point of view of the burden of proof. He submits in particular that it is for the administration to prove that one of the conditions required by Article 85 of the Staff Regulations for recovery of overpayment is satisfied (judgment of 11 October 1979 in Case 142/78 *Berghmans* v *Commission* [1979] ECR 3125). He argues that the Commission has not proved that it never received the covering notes which he claims to have annexed to the applications for the education allowance.

10 The Commission refutes that argument by appealing to the principles *actori incumbit probatio* and *reus in exceptione fit actor.*

11 The Court of First Instance considers that various matters in the documents before the Court support the Commission's argument that the applicant was aware that there was no due reason for the payments in question.

12 First of all, in October 1986 and October 1987 the applicant forwarded to the administration the annual claim for the education allowance in respect of his daughter Monica, born in March 1962, who was studying in the Netherlands, after striking out the three alternative statements at point 3 of the form, which provide respectively for the case where no education allowance is received from another source, the case where an education allowance is received (with a

statement of its amount, the name of the institution making payment and that of the child for whose benefit payment is made) and finally the case where the child receives an allowance directly (again with a statement of the additional particulars required in the second case). Thus by striking out the last alternative the applicant denied that his child was in receipt of an allowance in respect of her studies, which obviously did not correspond to the true situation. It is common ground that the applicant's daughter received from the Netherlands authorities an allowance in the amount of HFL 605 per month, as is clear from the note which the applicant sent on 12 July 1988 to Mr Michiels, an official in the Commission's Administrative Rights and Remuneration Division (see Annex 6 to the application).

13 In acting in that manner the applicant did not comply with his obligation under Article 67(2) of the Staff Regulations. It is clear that he failed to supply the administration with the information in his possession, of which he had certainly appreciated the significance and which could easily have been entered on the specific form. That view results from the following considerations.

14 The applicant could not have been unaware that the Netherlands law which entered into force on 1 October 1986 provided for the grant of an educational allowance to students studying in the Netherlands and that the new system was distinguished from the previous one mainly by the fact that the grant was paid not to parents but directly to the students. As regards the nature of the grant it is clear from the substance of the Netherlands law that it is an allowance intended to provide students with financial aid to enable them to finance their studies and living expenses while studying. There can thus be no doubt that the applicant, who is of Netherlands nationality and occupies a senior position in the Community administration, appreciated the effect of that law and therefore was well aware that pursuant to Article 67(2) of the Staff Regulations the Community education and dependent child allowances could not be combined with the Netherlands allowance granted for similar purposes and could be paid only in so far as they might supplement the Netherlands allowance. The very title of the Netherlands law ('studiefinanciering') makes it immediately clear that the allowance in question is intended both to contribute to daily living expenses (fulfilling in that respect the same function as the Community dependent child allowance) and to cover the

purchase of books and other educational material (a function corresponding to that of the Community education allowance).

15 The view of the facts set out thus far is not altered by the fact that the Commission did not ask the applicant for an explanation after receiving the forms in which all the alternatives under point 3 had been struck out, that is to say after receiving information which was certainly not a model of clarity. The Commission's attitude cannot affect the position, for it is clearly established that although the applicant was well informed of the nature of the grant made to his daughter by the Netherlands authorities, he refrained from declaring the sums received to the appropriate department of the Commission.

16 The above considerations are corroborated by the fact that after the Wet op de studiefinanciering entered into force several officials of Netherlands nationality whose children were studying in the Netherlands completed the application for the education allowance in full, stating at the third indent of point 3 of the form the precise amount of the allowance paid directly to their children by the Netherlands authorities (see the documents annexed to the rejoinder). That demonstrates two facts: the form was quite appropriate for entering the information in question and, contrary to what the applicant claims, the Wet op de studiefinanciering gives rise to no doubt about the nature of the basisbeurs, that is to say the fact that that allowance corresponds to the education allowance and the dependent child allowance provided for by the Community rules.

17 The applicant states that he attached a covering note to both the first and second applications to point out to the administration that from 1 October 1986 his daughter had been in receipt of an educational grant in the Netherlands which replaced another allowance previously paid direct to parents (see Annex 3 to the application). He claims by those notes to have informed the administration of the fact that his daughter was in receipt of an allowance the nature of which he could not properly determine. The Commission states that it never received the two covering notes, but only the two applications for the education allowance in which the three alternatives at point 3 had been struck out.

18 The applicant's argument cannot be accepted. There is no evidence that the two covering notes were forwarded to the administration. The applicant has simply produced photocopies which cannot be accepted as proof. It should be observed in that respect that in the forms forwarded to the administration in 1986 and 1987 there is no mention of the covering notes which are said to have been attached, although it seems quite reasonable and in accordance with good administrative practice to indicate on the main document the existence of any annexes.

19 Indeed, the most appropriate means of informing the administration of any doubts would have been to send a letter clearly setting out the official's point of view together with any relevant information, in particular a statement of the amount of the Netherlands allowance; Mr Sens did not do so until 1988, when he wrote to the Administrative Rights and Remuneration Division, although even then he did not state the amount of the Netherlands allowance.

20 It cannot be inferred from those facts that the burden of proving that the notes were forwarded, which as a matter of principle is on the official who makes the allegation, has passed to the administration. No evidence of actual transmission of the notes appears from the documents or the observations of the parties. To require the Commission in such circumstances to prove that it did not receive the note would be an infringement of the principle *actori incumbit probatio*, according to which each party must prove only the positive facts on which it relies; in other words the principle precludes a party from having the burden of proving purely negative facts.

21 Consideration of the facts of the case thus leads to the conclusion that not only was the applicant aware of the nature of the basisbeurs but by striking out the third alternative in the declaration provided for in Article 67(2) of the Staff Regulations he gave the administration information which did not correspond to the facts.

22 In view of that finding it is unnecessary to consider whether the facts of the case meet the second alternative condition provided for in Article 85 of the Staff Regulations, that is to say whether the fact of the overpayment was patently such that

the official could not have been unaware of it. In any event the facts which have led to the conclusion that the applicant was aware that there was no due reason for the payment *a fortiori* constitute evidence that the applicant could not have failed, had he displayed a minimal degree of diligence, to be aware that there was no due reason for the payment.

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

Costs

24 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to proceedings before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those rules provides that in proceedings brought by servants of the Community the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Saggio Yeraris Lenaerts

Delivered in open court in Luxembourg, 10 May 1990.

H. Jung
Registrar

A. Saggio
President of the Third Chamber