JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 27 JUNE 1973 [1]

Annemarie Kuhl
v Council of the European Communities

Case 71/72

1. *Officials — Disputes with the Administration — Appeal — Time limit — Commencement — Measure affecting a specific individual — Notification to the person concerned — Concept*
   (Staff Regulations, Art. 91)

2. *Officials — Recovery of undue payment — No due reason for payment — Awareness of the recipient — Objection — Evidence — Absence — Examination of the circumstances of the payment*
   (Staff Regulations, Art. 85)

1. The expression 'notification ... to the person concerned', in Article 91 of the Staff Regulations means the written Communication to the official concerned as required by Article 25 of the Staff Regulations in the case of any decision relating to a specific individual.

2. In the second alternative referred to in Article 85, if the recipient disputes having had knowledge of the undue payment, the circumstances in which the payment was made must be examined in order to determine whether the undue payment was patently evident.

In Case 71/72

ANNEMARIE KUHL, an official at the Council of Ministers of the European Communities, residing at Brussels, represented by Otto Kuhl of the Düsseldorf Bar, with an address for service in Luxembourg at the offices of Horst Hergel, 14 rue des Bains,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Gonzague Lesort, Legal Adviser at the General Secretariat of the Council, with an address for

1 — Language of the Case: German.

service in Luxembourg at the offices of Emile Reuter, legal adviser of the Commission, 4 boulevard Royal,

defendant,

Application for annulment of the decision of the Council of 30 June 1972, refusing to waive a claim for recovery of overpayments,

THE COURT (Second Chamber)

composed of: P. Pescatore, President, M. Sørensen and Lord Mackenzie Stuart (Rapporteur), Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. The applicant has been in the service of the Council of Ministers since 1958 and at present holds the post of reviser in the language service in Grade LA/4. She has three children of school age, two of whom attended a school in Germany until August, 1970 and for whom she received an education allowance. In September 1970 these two children left Germany to go to the European school in Brussels where the third child was also entered.

2. Under the relevant provisions of the Staff Regulations, the applicant was entitled only to a smaller allowance, because from then on her children were attending a school in the place where the family home was situated.

3. Under Article 8 of the general provisions for giving effect to the Staff Regulations relating to the grant of an education allowance,

'the servant is responsible for notifying . . . any change likely to cause the withdrawal or reduction of the said allowance.'

4. These provisions were promulgated by staff announcements addressed individually to all servants of the Secretariat of the Council. They were reproduced in a staff announcement of 26 June 1963, and following subsequent amendments, fresh announcements were addressed to the staff at least once a year. These announcements contained, in

addition to the amendments, the full up-dated provisions in force.

5. On 15 January 1971 the applicant lodged with the administrative department of the Council the form 'Application for reimbursement of education costs', where, under the head 'Educational establishment attended', she showed the European school in Brussels for her three children.

By telephone she notified the appropriate departments of the change of school and, a few days later, received a copy of a form which had been examined in the meantime by the administrative departments and which the accounts department had headed in manuscript 'Change of school on 1 September 1970'.

The applicant had also signed the undertaking to 'notify any change in the circumstances shown in this application'.

6. In January 1972 the applicant was informed by the accounts department that for a period of 16 months she had been receiving an overpayment of education allowance.

7. The sum of 28 691 BF was deducted from her pay in January 1972, as she had been informed it would be.

8. On 19 January 1972 the applicant addressed a note to the Director of the Personnel Division headed 'request for waiver of recovery of the overpayments-excess education allowances during the years 1970 and 1971'.

The first paragraph of the note read:

'I have recently been informed that during the years 1970 and 1971 I was erroneously paid too large an education allowance.

This sum, which now amounts to 28 691 BF, will be deducted from the January payment of arrears.'

The remainder of the note deals with the allegedly unjust nature of the recovery.

9. On 10 March 1972 the Secretary General of the Council, being the appointing authority, replied to the applicant's note by a letter which begins as follows:

'In reply to your letter of 19 January 1972, I have to inform you that, after thorough investigation, I must confirm the notification sent to you by the administration concerning the recovery of the education allowances overpaid.'

10. On 13 March 1972, the applicant sent a letter to an official of the Personnel Division requesting him to refund the 28 691 BF and in future to reduce her salary by only 2 000 BF per month. The letter begins thus:

'My request for the waiver of recovery of the education allowances overpaid to me has been rejected by a notification dated 10 March 1972 passed to me today.'

11. On 23 March the Director of the Personnel Division of the Council rejected this request.

12. On 7 June 1972 the applicant addressed a letter to the Secretary-General of the Council, headed 'Recovery of amounts overpaid (education allowances) — complaint under Article 90 of the Staff Regulations.'

13. On 30 June 1972 the Secretary-General addressed a note to the applicant which simply confirmed the note of 10 March 1972.

14. The present appeal against the decision of the Council was entered in the Court Register on 2 October 1972.

On the report of the Judge-Rapporteur, having heard the Advocate-General, the Court (Second Camber) decided to open the oral procedure without any preparatory enquiries.

The parties presented oral argument at the hearing on 15 March 1973.

The Advocate-General presented his opinion at the hearing on 11 April 1973.

II — Submissions of the parties

The *applicant* asks the Court:

— to declare the application admissible and justified on the merits;

— to say that the applicant was unaware of the irregularity affecting the payments made to her and that this was not so apparent that the applicant could not have failed to be aware of it;

— to annul the decision of the defendant dated 30 June 1972 and to say that the defendant has no claim to recover the overpayment;

— to order the defendant to pay all costs.

The *Council* asks the Court:

— to reject the application as inadmissible for being out of time;

— as a subsidiary plea, to reject the application as unfounded and to say that the conditions set out in Article 85 of the Staff Regulations for the recovery of undue payment are fulfilled and the authority is therefore entitled to demand it;

— to order the applicant to bear the costs.

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarised as follows:

Admissibility

The *applicant* contends that the disputed decision was taken by the Secretary General of the Council on 10 March 1972, the date on which he rejected her request of 19 January 1972. The applicant submitted a complaint on 7 June 1972 against this rejection in accordance with Article 90 of the Staff Regulations. The complaint was rejected by the appointing authority on 30 June 1972. The application is consequently admissible because the applicant, within the time limit allowed, brought both the complaint against the Council's decision to reject her request and the disputed application.

For the *defendant*, it is by virtue of the document dated 3 January 1972 signed by the authorizing officer and subsequently approved by the financial controller that the amount of the sums overpaid was fixed. This document, drawn up by the competent authority, constituted at this stage a decision because it indicates succinctly but clearly that the education allowances had been calculated on a different basis from that which should have been applied in the applicant's case after her two children returned to Brussels. The note of 19 January 1972, whereby the applicant brought before the appointing authority a complaint against the decision taken concerning her, should be considered as a complaint within the meaning of Article 90 of the Staff Regulations because it manifestly led to a decision being obtained from the appointing authority, which on 10 March 1972 effectively rejected this complaint.

An action against this decision should have been brought within a time limit of 3 months.

The *applicant's* answer is that the documents presented by the Council, the Staff notes on 'salaries and allowances' cannot be considered as a decision: a decision giving ground for complaint should have been addressed to the applicant and should have mentioned the grounds on which, in the Council's opinion, the conditions for the application of Article 85 were fulfilled.

Moreover the accounting documents, allegedly drawn up on 3 January 1972, never reached the applicant. She was only orally informed by an official in Grade C that she had received an overpayment; he also informed her that the administration would effect recovery

on the payment of arrears due by reason of the retrospective increase in salaries payable in January 1972.

It is not therefore possible to speak of a decision which could be the subject matter of a complaint any earlier than the time of the decision of 10 March 1972 to reject the application.

The *defendant's* reply is that the applicant received a duplicate of the notes in question. The printed words on the form were designed for this purpose. It bore the heading 'Copy' and the name of the party concerned.

The payment of arrears of salaries was in fact carried out by the accounts department which can confirm having been instructed to do so.

In her complaint of 19 January 1972 the applicant made no reference to the absence of a decision in writing; nor did she put forward this complaint after receiving the decision of 10 March 1972 which stated however: 'after thorough investigation, I must confirm the notification sent to you by the administration . . .'

Supposing that the applicant's statement were accepted that the decision was neither given in writing, nor well-founded and that it never reached her, her application remains nonetheless inadmissible. It is in fact clear that a decision was taken, otherwise the applicant could not have contested it in her complaint of 19 January. Moreover in this complaint she did not dispute the formal validity of the decision; she merely disputed its contents.

Furthermore both her pay-slip and the discussions she had with officials of the administration would have shown her the existence of a decision whose formal validity she should have disputed within the legal time limits.

The alleged decision of 30 June 1972 was only a confirmation of the note of 10 March. Moreover, according to the Court's consistent rulings, decisions which are purely confirmatory do not set a new time limit.

Merits

The *applicant* claims that overpayments amounting on average to about 1 700 BF per month did not represent for a Grade LA/4 salary a sum which would cause any surprise. Besides, as her children had not in the past attended a school in the place where the family home was situated and, her youngest child having just been entered at the school for the first time, she did not consider the increase in the education allowance anything out of the ordinary. It is also noteworthy that the overpayment was made at a time when work was particularly heavy. The applicant relied on the normal functioning of the administrative services.

She claims that knowledge of the matter in dispute or the impossibility of the lack of such knowledge can only be a condition for the admissibility of the right of recovery and that the burden of proof is on the defendant; in this case the right of recovery therefore lost its legal basis. As a subsidiary plea the applicant makes the point that Article 85 constitutes a power and it would be a misuser if the defendant intends to exercise it after such a long delay.

The *defendant's* reply is that the competent authority, before deciding to reject the applicant's request, took account of her material and social circumstances and did not consider that these circumstances justified any departure from the principle of recovery of sums received by way of overpayment.

The defendant contends that the applicant, knowing the relevant provisions could not in any event be unaware that there was no due reason for the payment. Moreover a duplicate of the request made by the applicant in January 1971 was sent to her, completed by the salaries branch on the basis of the sum she should have received.

The defendant makes the further observation that the applicant is partly responsible for the administrative error because she failed in her clearly defined

obligation 'to notify any change of circumstances as declared'.

The request for repayment of education costs, normally made at the beginning of the year was not made in this case until 4 months after the change in question had taken place and cannot therefore be considered as satisfying the requirements of the implementing provisions concerning education allowances.

The *applicant*'s reply is that the general promulgation of the implementing provisions dates partly from 1963, when her eldest child was not yet three years' old.

So long as there is no particular ground for suspicion minor errors pass unnoticed given that the final result was feasible.

The *defendant*'s reply is that an error on the part of the institution necessarily forms the basis for recourse to Article 85 of the Staff Regulations but this error cannot of itself justify the retention of an advantage improperly acquired. The only question which arises is that of knowing whether the party concerned was aware of the overpayment or whether it was patently such that she could not fail to be aware of it.

Only if the applicant refuses to learn what are her rights and obligations or to take cognizance of information sent to her personally, at frequent intervals and in clear terms, can she contend that it is normal to receive every month a sum not due, amounting to almost three times the normal education allowance.

The request for reimbursement of educational expenses was in no way intended as a notification to the administration of changes which had occurred. The obligation to notify an alteration is entirely different from a request for an allowance.

Grounds of judgment

1 The applicant, by an appeal entered in the Court Registry on 2 October 1972, asks for annulment of the decision of the Secretary-General of the Council of 30 June 1972, which rejects her complaint of 7 June 1972 against the decision of 10 March 1972, refusing to waive recovery of the education allowances overpaid following her children's change of school.

Admissibility

2 The Council has raised a plea of inadmissibility by reason of the appeal being out of time.

The decision to recover the overpayment was actually taken as at 3 January 1972.

The applicant's note of 19 January 1972 was a complaint against this decision within the meaning of Article 90 of the Staff Regulations.

The Secretary-General of the Council rejected this complaint on 10 March 1972 and an application against this decision should have been lodged within three months.

3 Under Article 91 (2) of the Staff Regulations, in the form then in force, appeals must be made within three months from the time of notification of the disputed decision to the person concerned.

The term 'notification . . . to the person concerned' in Article 91 of the Staff Regulations contemplates written communication to the official concerned as required by Article 25 of the Staff Regulations in case of any decision relating to a specific individual.

4 The defence alleges that the decision objected to in the appeal is constituted by the document of 3 January 1972 and that the latter had been communicated to the applicant.

The slip adjusting her salary addressed to the applicant on 15 January 1972 constituted at least a communication to her of the decision taken on 3 January, 1972.

5 Even if the applicant had received these documents — which she disputes — they do not explicitly show that a decision had been taken under Article 85 of the Staff Regulations, as they were merely accounting slips.

6 It follows that the only decision taken expressly under this provision is contained in the letter dated 10 March 1972.

7 The applicant made a complaint against this decision to the appointing authority and she has brought the present appeal within the time limits against the express rejection of this complaint.

It follows that the application is admissible.

Merits

8 Article 85 of the Staff Regulations provides two conditions in which a sum overpaid may be recovered.

9 In the first case, the overpayment may be recovered if the recipient was aware that there was no due reason for the payment.

This condition requires actual knowledge on the part of the recipient of the irregular nature of the payment.

10 In the second case, any sum overpaid may be recovered if the fact of the overpayment was patently such that the recipient could not have been unaware of it.

11 It follows that if the recipient denies having been aware of it and if there is no proof of any knowledge of the irregularity of the payment, then the circumstances in which the payment was made must be examined in order to determine whether the irregularity of the payment should have been plain to see.

12 Under Article 8 of the general implementing provisions dealing with the conditions for the grant of the education allowance 'the employee is responsible for notifying any change involving the withdrawal or reduction of the education allowance'.

Moreover the applicant had signed an undertaking in this sense at the time of her request for reimbursement of the education costs.

13 The applicant should have known that the change of school by her two elder children, from Germany to the place where the family home was situated, involved a reduction of the education allowance.

14 Not until 15 January 1971 did she notify her institution of the change of school which had taken place from 1 September 1970.

In these circumstances she is herself responsible for the irregularity in the rate at which the education allowance was paid to her for the last four months of the year 1970.

15 Since, even after this notification of change of school, she continued to receive as before the same education allowance for the two elder children, the applicant should have been aware of the perpetuation of the error.

16 In the circumstances the fact of overpayment was patently such that the applicant could not have been unaware of it.

The Council therefore properly required recovery of the overpayment.

Costs

17 The applicant has failed in her application.

Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

However, under Article 70 of the Rules of Procedure, costs incurred by the institutions, in applications by servants of the Communities, shall be borne by the institutions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaties establishing the European Communities;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 85, 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**
2. **Orders each party to bear its own costs.**

Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 27 June 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 11 APRIL 1973 [1]

Mr President,
Members of the Court,

I — The Facts

By way of family benefits listed under Article 67 of the staff regulations, officials of the European Communities receive for each dependent child who is in regular full-time attendance at an educational establishment, an education allowance which, by virtue of Article 3 Annex VII of the staff regulations, is equal to the actual education costs up to a monthly maximum.

However, the general provisions for giving effect to these Regulations adopted under the conditions laid down in Article 110 make a distinction between two situations:

— Where the children of the official attend a school away from the place where the family home is situated, the sum granted is the maximum monthly allowance.
— Where the children attend an establishment in the area in which the family home is situated, the official must choose between a flat-rate allowance which is slightly less than the maximum, and repayment of the costs actually incurred, on evidence that they were so incurred.

Finally, by Article 8 of the general provisions for giving effect to the staff regulations, officials are obliged to inform the Administration of any change in the educational situation of their children which is likely to lead to the

1 — Translated from the French.