JUDGMENT OF THE COURT (Second Chamber)
17 January 1989 *

In Case 310/87

Jacobus Stempels, a former official of the European Communities, residing in Berne (Switzerland), represented by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Paul Beghin, 48 avenue de la Liberté,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser Joseph Griesmar, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Centre Albert Wagner, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision to recover from the applicant the household allowance wrongly paid for the period from 1 January 1984 to 1 December 1986 and the decision rejecting the applicant's complaint,

THE COURT (Second Chamber)

composed of: T. F. O'Higgins, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: G. Tesauro
Registrar: D. Louterman, Administrator

* Language of the case: French.

having regard to the Report for the Hearing and further to the hearing on 1 December 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 1 December 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 October 1987, Jacobus Stempels, a former official in Grade A 2 of the Commission, brought an action for the annulment of the Commission's decision of 15 July 1987 rejecting his complaint against the decision of the appointing authority dated 9 December 1987 to recover the household allowance wrongly paid to him for the period from 1 January 1984 to 1 December 1986.

2 It appears from the pleadings that Mr Stempels, who is divorced, had until his retirement on 1 December 1986 continued to receive the household allowance, although his daughter had ceased to be dependent on him on 1 January 1984.

3 The appointing authority took the view that payment of the household allowance was contrary to Article 1(2)(b) of Annex VII to the Staff Regulations of the European Communities, and it therefore decided to recover the sums wrongly paid, pursuant to Article 85 of the Staff Regulations.

4 Reference is made to the Report for the Hearing for a more detailed account of the facts, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 Article 85 of the Staff Regulations, in Chapter 4 on recovery of undue payment, provides for two cases in which a sum overpaid to an official is to be recovered, namely where the recipient was aware that there was no due reason for the payment or the fact of the overpayment was patently such that he could not have been unaware of it.

6 Although the applicant's statement that he was unaware that the payments in question were incorrect may seriously be doubted and although a reasonable interpretation of Article 85 of the Staff Regulations rather appears to require the recipient of the undue payment to provide evidence making the alleged unawareness plausible, it is sufficient in the present case to consider whether the fact of the overpayment was patently such that he could not have been unaware of it (see the judgment of 11 July 1979 in Case 252/78 *Broe* v *Commission* [1979] ECR 2393).

7 Article 1(2)(b) of Annex VII to the Staff Regulations on remuneration and reimbursement of expenses provides that the household allowance is payable to a divorced official who has one or more dependent children within the meaning of Article 2 of the Annex.

8 Article 2 sets out the conditions under which the household allowance is payable and provides *inter alia*, in paragraph 5, that payment of the allowance in respect of a child prevented by serious illness or invalidity from earning a livelihood shall continue throughout the period of that illness or invalidity, irrespective of age.

9 By letter dated 23 March 1983 the Head of the Financial and Administrative Rights Division of the Commission informed the applicant that following his request for the application of the provisions of Article 2(5) of Annex VII to the Staff Regulations he would receive the dependent child allowance until 31 December 1983.

10 Any normally diligent official should clearly have been put on notice that as from the expiry of that date his right to the household allowance was doubtful and that it was, at the very least, necessary to make a check. The phrase 'patently such' in Article 85 of the Staff Regulations does not mean that an official who receives undue payments need make no effort to reflect or check but rather that recovery is due where the error is one which does not escape the notice of an official exercising ordinary care, who is deemed to know the rules governing his salary (see the aforementioned judgment of 11 July 1979).

11 In those circumstances the administration's mistake in relation to an aspect of his salary could not therefore escape the notice of a normally diligent official, *a fortiori* one of the applicant's grade and seniority, who moreover was for many years responsible for managing the appropriations of the Secretariat-General of the Commission.

12 It follows from the foregoing considerations that in this instance the Commission correctly applied Article 85 of the Staff Regulations, since the unlawfulness of the payment of the household allowance after 31 December 1983 was patently such that the applicant could not have been unaware of it.

13 The application must therefore be dismissed as unfounded.

Costs

14 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure the institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Dismisses the application;

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

O'Higgins Mancini Schockweiler

Delivered in open court in Luxembourg on 17 January 1989.

J.-G. Giraud
Registrar

T. F. O'Higgins
President of the Second Chamber