# REPORT FOR THE HEARING
delivered in Case 310/87 *

## I — Facts

1. Jacobus Stempels, who had been an official of the Commission since 1 September 1958, assigned to the department of the Secretary-General, was retired as a special adviser in Grade A 2 on 1 December 1986.

2. By letter dated 26 October 1976 Mr Stempels had informed the Director for Personnel of a change in his marital status as a result of his divorce. In that letter he referred to information obtained from an official in the Personnel Department according to which the change in his marital status would not affect his remuneration.

3. Since his daughter was still dependent on him Mr Stempels continued to receive the dependent child allowance and the household allowance pursuant to Articles 1(1) and 2 of Annex VII to the Staff Regulations.

4. By letter dated 23 March 1983 the head of the Financial and Administrative Rights Division of the Directorate-General for Personnel and Administration informed Mr Stempels that the administration accepted his claim for the dependent child allowance in respect of his daughter for the period from 1 January 1983 to 31 December 1983.

5. In the course of settling Mr Stempels' financial entitlement as a pensioner the Commission's administration discovered that he had continued to receive the household allowance until his retirement, contrary to Article 1(2) of Annex VII to the Staff Regulations, which provides that a divorced official is entitled to the household allowance only if he has one or more dependent children.

6. By letter dated 9 December 1986 the Director for Personnel informed Mr Stempels that the Commission had decided to apply Article 85 of the Staff Regulations, according to which any sum overpaid is to 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. On 12 January 1987 the head of the Salaries Office informed Mr Stempels that the sum to be recovered was BFR 627 022, representing the household allowance wrongly paid for the period from 1 January 1984, the date when Mr Stempels' daughter ceased to be dependent, until 1 December 1986, the date when Mr Stempels retired.

7. Following an exchange of correspondence which led to no conclusion Mr Stempels lodged a complaint on 5 March 1987 in which he requested the Commission to reverse its decision to recover the household allowance wrongly paid and

* Language of the case: French.

asserted that the conditions in Article 85 of the Staff Regulations were not satisfied.

8. By letter dated 15 July 1987 the Commission notified Mr Stempels of its reasoned decision rejecting his complaint.

## II — Written procedure and conclusions of the parties

1. By application lodged at the Court Registry on 12 October 1987 Mr Stempels brought an action for annulment of the Commission's decision of 15 July 1987.

2. *Jacobus Stempels*, the applicant, claims that the Court should:

Annul the decision to withhold the sum of BFR 627 022 from the amounts payable to him as a retired official;

In the exercise of its unlimited jurisdiction, order the defendant to repay to the applicant all the amounts which have so far been withheld;

Order the defendant to pay the applicant interest at the rate of 6% on those amounts with effect from the date on which they were deducted from the sums paid to him;

Order the defendant to pay the costs.

3. The *Commission*, the defendant, contends that the Court should:

After hearing, if necessary, Mrs Delauche as a witness:

Dismiss the application;

Make an appropriate order as to costs.

4. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

## III — Submissions and arguments of the parties

1. Mr Stempels submits that Article 85 of the Staff Regulations is based on the notion that save in the two cases mentioned, namely where the recipient was aware that there was no due reason for the payment or the overpayment was patently such that he could not have been unaware of it, the administration should regard the recipient as being in good faith. In consequence the Commission ought not to inquire whether in any particular case the person concerned knew the provision of the Staff Regulations infringed, since the recipient is not required to know the Staff Regulations.

The Commission cannot maintain that the applicant was aware that there was no due reason for the payment. On the contrary, the administration's conduct was such as to lead the applicant to think that he was within his rights. He had informed the administration of his divorce and it was not for him to check what was done after he had given the information. The Commission cannot accuse him of having acted at any time in bad faith.

Article 85 of the Staff Regulations can apply only if the fact that there was no due reason

for the payment was so patent that it could not be explained as a mistake of the official due to ignorance of the Staff Regulations.

The notion of a normally diligent official who should notice the error committed by the administration must be determined *in abstracto*. The Court has always insisted on such determination *in abstracto*, for instance in two judgments of 27 June 1973 (Case 71/72 *Kuhl* v *Council* [1973] ECR 705) and 11 October 1979 (Case 142/78 *Exner* v *Commission* [1979] ECR 3125) relating to recovery of overpayment and a judgment of 18 March 1975 (Joined Cases 44, 46 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383) relating to non-payment for days not worked as a result of a strike by officials. Recovery of overpayment is therefore possible only if the average official, as a reasonable man, ought to have noticed a patent error on the part of the administration.

The Commission wrongly alleges that comparison of the salary slip for December 1983 with that for January 1984, the month when the applicant stopped receiving the dependent child allowance, should have drawn the attention of any reasonably diligent official to the fact that the household allowance was wrongly paid. Salary slips do not inform officials of the grounds for the various entries and it is not up to the person concerned to check whether his personal file is in order. An official is not deemed to know all the provisions of the Staff Regulations, in particular those of Annex VII to the Staff Regulations, which are particularly complicated. During his employment the applicant was not concerned with accounting problems or problems connected with the Staff Regulations. The interview which the applicant had in 1976 with an official from the administration did not relate to the question of the household allowance.

Moreover even if the case were assessed *in concreto* the applicant must be recognized to have displayed very great care.

2. The Commission contends that according to the interpretation which Mr Advocate General Mayras gave to Article 85 in his Opinion in the *Kuhl* case, an action for the recovery of overpayment may be brought in the following circumstances: the official received certain sums in error; he was not in good faith or even if he was in no way responsible he was aware that there was no due reason for the payment; an error on the part of the administration, even where it is not brought about by the official, does not exclude an action for recovery unless the official remained unaware that there was no due reason for the payment and under normal circumstances he could not have been aware of it because it was in no way obvious to him.

If those conditions are applied to the present case it must be recognized that the applicant wrongly received the household allowance from 1 January 1984 to 1 December 1986. It is true that it cannot be alleged that he caused the administration's mistake but it may be accepted that he had constructive knowledge of the irregular nature of the payment. With regard to the burden of proof the Court held in a judgment of 11 July 1979 (Case 252/78 *Broe* v *Commission* [1979] ECR 2393) that a reasonable interpretation of Article 85 rather appears to require the recipient of the undue payment to provide evidence making the alleged unawareness plausible. The facts put forward by the applicant, namely that he had informed the administration of his divorce, that he did not have to check what was done about that information and that it cannot be alleged that he acted in bad faith, are irrelevant. On the contrary, the applicant was informed in 1976 following an

interview with an official of the administration that the grant of the household allowance depended on there being a dependent child. The termination of the dependent child allowance in January 1984 ought to have led him to question the validity of the continued payment of the household allowance.

The condition stated by the Court in the *Broe* case, that is to say whether the overpayment was so obvious that the person concerned could not fail to be aware of it, does not mean that the official is absolved of any need to reflect; it is necessary to inquire whether the error would have been obvious to a normally diligent official. Salary slips are accounting documents which implement payment decisions previously adopted, and the latter constitute the justification for them. The applicant had been informed by letter dated 23 March 1983 that the dependent child allowance would cease and the continuance of the household allowance could not have led him legitimately to believe that the administration had not made a mistake.

The Court has not refused all consideration of the careful official *in concreto*. In the judgment in the *Broe* case it upheld both types of assessment, referring in particular to the circumstances of the case and the level of the official concerned. The *Berghmans* case was different inasmuch as it was accepted that the administration's conduct could have led the recipient reasonably to believe that he was entitled to the amounts paid. It is true that in the judgment in the *Acton* case the Court gave a ruling in respect of the rights of an average official considered *in abstracto*, but it cannot be suggested that in other circumstances that choice precludes an assessment taking into account the personal situation of the person concerned.

The applicant, an official in a high grade, was concerned for some years with the management of the appropriations of the Secretariat-General, which sufficiently proves his intellectual capacity to check salary statements. The application of Article 85 of the Staff Regulations cannot be confined to officials responsible for applying the Staff Regulations.

F. A. Schockweiler
Judge-Rapporteur