

By decision of 31 July 2003, notified on 1 August 2003 by fax, the Opposition Division upheld the opposition. By letter of 1 October 2003, received by the Office on 7 October 2003, the applicant appealed against that decision. By letter of 23 October 2003 the clerks' office of the Board of Appeal informed the applicant that the appeal had not been lodged within the time limit and requested the applicant to submit his observations on that point. The applicant subsequently lodged an application for *restitutio in integrum*.

By a decision of 3 March 2004 the Second Board of Appeal of the Office rejected that application and the applicant's appeal.

The applicant submits that the appeal was signed by the applicant's representative on the last day before expiry of the time limit and placed on the pile of post to be sent out by fax. However, by error, after payment of the appeal fee, the employee responsible for the post did not replace the item with the others to be sent by fax but with those to be sent by recorded mail.

The applicant claims that, in reaching the contested decision, the Office failed to apply correctly the rules in Regulation No 40/94 governing *restitutio in integrum*. Had they been correctly applied, the Office would have been obliged to conclude that the requirements for *restitutio in integrum* were fulfilled in the present case, since there was no organisational fault which would prevent restitution in *integrum* and the rules on late payment of fees in the fees regulations would have been applicable by analogy.

The applicant submits that objectively this is a case of a minor oversight that could not be prevented by reasonable commercial methods of organisation. It should also be borne in mind that the other party in the appeal proceedings suffered no procedural disadvantage.

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**Action brought on 30 April 2004 on by Eugénio Branco Lda against the Commission of the European Communities**

(Case T-162/04)

(2004/C 217/37)

(Language of the case: Portuguese)

An action was brought before the Court of First Instance of the European Communities on 30 April 2004 against Commission of the European Communities by Eugénio Branco Lda, represented by Bolota Belchior, lawyer, with an address for service in Luxembourg.

The applicant claims that the Court of First Instance should:

— Annul the Commission decision of 8 August 2004 which failed to approve the claim for payment of the balance due under the European Social Fund (ESF) financing procedure, did not allow certain expenses submitted by the applicant, thereby reducing the ESF contributions for training approved by the Commission decision, and called on the applicant to repay the sum of EUR 39 899.07, which it had received as advances from the ESF, and the national public contribution from the Portuguese State;

— Order the Commission to pay the costs.

*Pleas and principal arguments adduced in support*

On 29 June 1986, the applicant submitted to the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs – DAFSE) of the Portuguese State an application for financing to be granted by the ESF for vocational training for the period from 2 January 1987 to 31 December 1987, which was approved by Commission decision. The applicant requested payment of the balance from the DAFSE, there being a balance in favour of the applicant. The DAFSE analysed the accounts and documents relating to the applicant and documents relating to the training actions and, by decision of 13 March 1989, approved the request for payment of the balance. Similarly, the Commission approved the request for payment of the balance. On 8 August 2004, the Commission adopted the decision against which these proceedings are brought.

According to the applicant, the decision infringes Council Regulation (EEC) No 2950/83 of 17 October 1983, giving effect to Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund, since the applicant rigorously complied with all the relevant laws, regulations, directives, criteria, requirements and conditions when its application to the ESF was approved, thereby acquiring subjective vested rights. The contested decision thus infringes vested rights.

The decision at issue also breaches the principles of the protection of legitimate expectations and of legal certainty, since the approval decision gave the applicant the right and the legally significant expectation that it would receive the contributions if it carried out the training in accordance with the agreed conditions. According to the applicant, the Commission could have taken the action which it has now purported to take at the start of 1989, and by not doing so breached the principle of the protection of legitimate expectations and legal certainty.

Finally, the contested decision represents a serious breach of the principle of proportionality, since the applicant incurred the expenditure on the basis that the Commission would fulfil its commitment and its agreement to contribute.