

JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 11 JULY 1979¹

Arne Broe
v Commission of the European Communities

“Recovery of undue payment”

Case 252/78

Officials — Recovery of undue payment — Conditions — “Patent” overpayment — Concept

(Staff Regulations of Officials, Art. 85)

Article 85 of the Staff Regulations, under which any sum overpaid is to be recovered, in particular if the fact of the overpayment was patently such that the recipient could not have been unaware of it, must be interpreted as referring not to whether the error was or was not patent to the administration but whether it was

so for the beneficiary, who, far from being exonerated from any effort to reflect or check, is, on the contrary, required to make repayment where the error is one which would not escape the notice of an official exercising ordinary care.

In Case 252/78

ARNE BROE, an official of the Commission of the European Communities, residing at 22 Avenue de la Charmille, Brussels, represented and assisted by Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, Advocate at the Court, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio, a member of its Legal Department, acting as Agent, assisted by Daniel Jacob,

¹ — Language of the Case: French.

of the Brussels Bar, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Commission to recover from the applicant sums paid by way of the household allowance in respect of the period from 1 January 1975 to 31 August 1977, as well as of the implied decision rejecting the complaint submitted by the applicant on 14 April 1978,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

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

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. The applicant entered the service of the Commission on 1 January 1974 and since 1 December 1974 has performed the duties of an administrative assistant

in Grade B 4 at the Directorate-General for Agriculture (Directorate for the European Agricultural Guidance and Guarantee Fund, Financing and Auditing Division). His wife, who was also engaged by the defendant as a member of the auxiliary staff with effect from 1 February 1974, was appointed an official in Grade C 3, step 3, on 1 November 1974. From 1 January 1974 the applicant was paid the household allowance provided for in Article 67 (1) (a) of the

Staff Regulations, the conditions for payment of which are set out in detail in Article 1 of Annex VII to the Staff Regulations.

2. Following the applicant's divorce on 8 August 1977, payment of the household allowance ceased with effect from January 1978 since the applicant had no dependent child. An examination of the applicant's file carried out on that occasion led to the discovery by the officers of the Commission that he had been drawing the household allowance improperly from 1 July 1974 because from that date his wife's income before deduction of tax had exceeded the upper limit provided for, in respect of the grant of the household allowance, by Article 1 (3) of Annex VII to the Staff Regulations in the version in force during the period in question. In those circumstances the defendant considered that there were grounds for the recovery of the sums overpaid.

3. Accordingly, the applicant's salary statement for January 1978 indicated that he would have to repay to the defendant the sum of Bfr 96 272. A first memorandum dated 10 February 1978 from the Salaries, Pensions, Missions and Miscellaneous Allowances Division confirmed to the applicant the amount of the household allowance which had been paid in error and stated that with effect from February 1978 that sum would be recovered by means of twelve monthly deductions from his remuneration of Bfr 8 347.

4. Following certain steps taken by the applicant he was sent on 27 February 1978 a second memorandum by Mr Pratley, Head of the Individual Rights and Privileges Division, justifying the

application of Article 85 of the Staff Regulations which states that "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." That memorandum stated, however, that recovery would be made only of the amounts paid after 1 January 1975 because for the period from 1 July to 31 December 1974 the salary received by the applicant's wife had only exceeded the upper limit fixed in relation to the grant of the household allowance as a result of a retroactive readjustment carried out in December 1974. Provided that no mistake has been made the amount claimed is thus reduced to Bfr 92 536, having regard to the fact that the applicant did not receive a payment of arrears of salary amounting of Bfr 6 828 in January 1978.

5. On 14 April 1978 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations against the defendant's decision to implement the provisions of Article 85 of the Staff Regulations.

6. This application, dated 10 November, was received at the Court Registry on 13 November 1978.

7. In the meantime the Commission has rejected the applicant's complaint by decision adopted on 27 November 1978 and notified to him on 8 December 1978.

8. Upon hearing the views of the Advocate General the Court (First Chamber) decided to open the oral procedure without holding any

preparatory inquiry. However, the Court put to the Commission several questions to which it replied before the hearing was held.

II — Conclusions of the parties

- (1) The *applicant* claims that the Court should:
 - (a) Declare the application admissible and well founded;
 - (b) Annul the defendant's decision to recover the sums overpaid to the applicant by way of the household allowance in respect of the period from 1 January 1975 to 31 August 1977, as well as of the implied decision rejecting his complaint submitted on 14 April 1978;
 - (c) Order the defendant to repay to the applicant the sums deducted by way of recovery of the undue payment of the household allowance for the aforementioned period, as increased by default interest at the rate of 8% per annum with effect from the date on which each sum is deducted;
 - (d) Order the defendant to pay the costs.
- (2) The *Commission* contends that the Court should:
 - (a) Dismiss the application as unfounded;
 - (b) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

In his first submission in the application the *applicant* maintains that the defendant had infringed Article 85 of the Staff Regulations of Officials of the European Communities. That provision provides for two cases in which a sum overpaid may be recovered, that is, 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. Neither of those two conditions is satisfied in this instance. The applicant was not aware that there was no due reason for payment of the household allowance from 1 January 1975 and the defendant, on whom the burden of proof rests, does not maintain that. Furthermore, the fact of the overpayment was not patently such that the applicant could not have failed to be aware of it. It is not obvious from an examination of the salary statements that the household allowance was paid in error since the applicant was unaware of either the portion of his wife's remuneration to be taken into consideration for the application of Article 1 (3) of Annex VII to the Staff Regulations, or how to calculate the maximum remuneration of the spouse, above which, in principle, the household allowance is no longer payable and which, by reason of the effect of the weighting, was not that referred to in Article 1 (3) of Annex VII to the Staff Regulations. The fact of the overpayment was so little evident that the expert officers of the Commission did not discover it *motu proprio* although they had all the information available to enable them to do so.

In the alternative the applicant maintains that the contested decision breaches the principles of fairness, equality, distributive justice and sound administration and is vitiated by abuse of powers

inasmuch as even if the conditions laid down by Article 85 of the Staff Regulations were satisfied certain information which he has obtained shows that the defendant has not required the recovery of sums overpaid in other cases similar to his.

2. As regards the first submission relied on by the applicant the *Commission* states in its defence that it follows from the case-law of the Court and, in particular, from the judgment of 27 June 1973 in Case 71/72, *Kubl v Council of the European Communities* ([1973] ECR 705), that once an official claims that he had no knowledge of the fact that the sums paid to him were paid in error, the question whether the undue payment was patently evident must be examined. The Commission maintains that the arguments put forward by the applicant in support of the proposition that the fact of the overpayment was neither evident nor *a fortiori* so patent that he could have been unaware of it does not bear close examination. It recalls first that Article 1 (3) of Annex VII to the Staff Regulations in the version in force on the entry into service of the applicant and his wife fixed the upper limit of the annual income of a spouse before deduction of tax at Bfr 250 000. It also observes that at their meeting on 26 October 1973 the heads of administration agreed that in future the weighting for the country where the official and spouse performed their duties would be applied to the upper limit of Bfr 250 000. The effect of that system which has remained in force during the whole of the period during which the applicant received the household allowance, has been to raise the aforementioned upper limit to Bfr

292 500 for those officials who are employed in Belgium.

The Commission states that the applicant cannot claim to have been unaware of the existence of those provisions. It considers that even if the applicant succeeded in establishing that he was unaware of the application of the weighting to the upper limit of Bfr 250 000 despite its publication in the Staff Courier, that would not make the fact of the overpayments any less patent, since no official is entitled to rely on his ignorance of a measure which has been duly published in the Official Journal or internal notices addressed to the staff. It goes on to state that far from relieving the applicant of his duty to repay the sums overpaid his alleged unawareness of the application of the weighting to the upper limit of Bfr 250 000 is in fact of such a nature as to show even more clearly that there was no due reason for the payments. The Commission also takes the view that the applicant cannot claim that he was unaware of the amount of remuneration received by his wife.

Secondly, the Commission states that the fact that the overpayments result from an error on the part of the administration is not in itself sufficient to rule out the application of Article 85 of the Staff Regulations. In that connexion it relies on the opinion of Mr Advocate General Mayras, according to which an error on the part of the administration, even where it is not brought about by the official, does not in any way exclude an action for recovery: in fact, it is obviously one of the necessary conditions for bringing it (Opinion in Case 71/72, *Kubl v Council* [1973] ECR at p. 719). Consequently, it is pointless

for the applicant to rely on the calculation made by the officers of the Commission on his entry into service and on the fact that as his wife was also in the defendant's employment its officers had all the necessary information available.

The Commission concludes that the clear terms of Article 1 (3) of Annex VII of the Staff Regulations, as supplemented by the aforementioned decision adopted by the heads of administration, the publication of those measures in all the official languages, the fact that the applicant could not have been unaware of the remuneration received by his wife and the circumstances in which he was informed that he would be entitled to the household allowance are all factors which show that the fact of the disputed overpayments was patently such that the applicant could not have been unaware of it.

As regards the second submission, which is relied on by the applicant in the alternative, that is, breach of the principles of fairness, equality, distributive justice and sound administration, the defendant challenges the statements made by the applicant and concludes that unless he provides fuller information that submission must be dismissed.

3. In his reply the *applicant* states, first of all, that the discussion only concerns the second possibility referred to in Article 85 of the Staff Regulations, that is, the need to examine the circumstances in which the payment was made in order to determine whether the undue payment was patently evident.

Before replying to the arguments put forward by the defendant the applicant makes four preliminary observations:

1. Since the expert officers of the Commission have been at fault for more than two years the error cannot be described as patent, which it must be in order for there to be recovery of the undue payment.
2. Since the salary statements only indicate the grant of the allowance they do not reveal the irregularity, with the result that in order to discover it it would have been necessary to refer to the provisions of the Staff Regulations which deal with the various elements said to make up the remuneration.
3. When his former wife entered the service of the defendant in February 1974 the relevant department informed him that he was entitled to the household allowance.
4. Six or seven other officials who were in the same position as he was had also not discovered the error.

From those four preliminary observations the applicant concludes that the error was not patently such that he could not have been unaware of it and that his application is well-founded.

The applicant then turns to the arguments put forward by the defendant and maintains that he was unaware of the decision, adopted by the heads of administration on 26 October 1973, which supplemented Article 1 of Annex VII to the Staff Regulations. In that connexion he refers to the circumstances surrounding the distribution of the Staff Courier and asks why provisions implementing the Staff Regulations are not communicated to the staff in the same way as amendments to those regu-

lations, that is, in envelopes addressed to the staff by name. Moreover, even though Article 1 of Annex VII to the Staff Regulations clearly indicates the upper limit to be taken into consideration that is only one element of the problem, since it is then necessary to compare that upper limit with the amount of the spouse's income before deduction of tax, which is unquestionably a complicated procedure.

As regards the defendant's argument that if necessary he should have asked the responsible department for additional information the applicant observes that if additional information is necessary in order for him to become aware of an error then it is not patently such that he could not have been unaware of it, since it must be obvious to anyone exercising ordinary care.

The applicant maintains that where a husband and wife are employed by the same institution an official is not required to concern himself with the effect of the spouse's income on the other party's rights to remuneration, since the administration is necessarily in possession of all the facts. Accordingly, such official is under no obligation to communicate those facts to the institution in question. If the Commission's officers do not establish any correlation between the files of the husbands and wives in its service the fault must not be imputed to the official but to the institution.

The applicant goes on to state that he does not maintain his second submission, on the ground that he has received supplementary information to the effect that in April 1978 the officers of the Commission wrote to the six or seven

officials whose situation was identical to his own to inform them that the problem was under consideration and, as regards three of them, that the decision had even been taken to recover the undue payment.

4. In its rejoinder the *Commission* states, first, that it has not accepted that the applicant was entirely unaware that there was no due reason for the payment of the household allowance but has only stated that in the absence of any evidence it is not in a position to come to any conclusion on that point.

The defendant continues by stating that it is impossible to accept the applicant's argument that the fact of the overpayment of the household allowance cannot be patent since the administration, which has a specialized department available to deal with those matters, did not discover the irregularity for approximately two years. It refers again to the observations put forward in its defence and adds that its departments do not have the power to carry out a systematic and consistent review of the level of remuneration received by the spouses of its officials and servants and that for that reason it requires its officials to inform it of any change which takes place, in particular as regards the gainful employment of their spouses. In this instance the applicant failed to fulfil that duty, which prevented the Commission from checking whether or not there was due reason for the payment of the household allowance.

As regards the applicant's alleged difficulty in determining the amount of the remuneration received by his wife to be compared to the upper limit above which payment of the household allowance was to cease, the defendant maintains that it was sufficient for him to

add the net sum received by his wife to the amount of Community tax paid in order to obtain the monthly amount whose annual equivalent must be compared with the upper limit provided for by the Staff Regulations.

The defendant disputes the applicant's allegation that he had no knowledge of Article 1 (3) of Annex VII to the Staff Regulations and of the decision adopted by the heads of administration since, as he acknowledges himself, he received on his appointment a "vade-mecum" in Danish and a copy of the Staff Regulations in German, a language which according to his periodic report for the period from January 1974 to June 1975 he knew "very well". As regards the reading of the Staff Courier it is not too much to expect an official in his grade to distinguish between important notices and those of an anecdotal nature.

The defendant maintains that the applicant should at least have requested further information from its officers and that the fact that he was told when he was recruited that he was entitled to the household allowance is not conclusive, since information which is correct at the time it is given does not necessarily remain so subsequently, particularly where the factors on which it is based are in constant evolution.

It also contests the applicant's argument that the duty to communicate the

amount of the spouse's income is only incumbent upon those officials whose spouse is not employed by the Commission. On the contrary, it considers that that duty is incumbent upon all officials whose spouse is in gainful employment, whether or not at the Commission. By neglecting to perform that duty the applicant has disregarded the undertaking into which he entered when he took up his appointment and has failed in the "fundamental duty of ... co-operation which all officials owe to the authority to which they belong" (judgment of 14 December 1966, Case 3/66, *Alfieri v European Parliament* [1966] ECR at p. 448).

In conclusion the Commission takes note that the applicant is abandoning the submission relating to breach of the principles of fairness, equality, distributive justice and sound administration and to abuse of powers.

The applicant, represented by E. Lebrun, of the Brussels Bar, and the Commission of the European Communities, represented by its Agent, D. Sorasio, a member of its Legal Department, assisted by D. Jacob, of the Brussels Bar, presented oral argument at the hearing on 31 May 1979.

The Advocate General delivered his opinion at the hearing on 21 June 1979.

Decision

- 1 The application, dated 10 November 1978, seeks the annulment of the decision of the Commission to recover from the applicant the sums overpaid by way of the household allowance in respect of the period from 1 January 1975 to 31 August 1977, as well as of the implied decision rejecting the applicant's complaint in that connexion which was submitted to the appointing authority on 14 April 1978.
- 2 The applicant and his wife, who are Danish nationals, have both been employed in the service of the Community at Brussels since the beginning of 1974. From that date the applicant received the household allowance provided for in Article 67 (1) (a) of the Staff Regulations of Officials, the conditions for the grant of which are laid down in Article 1 of Annex VII to the Staff Regulations. According to the terms of the latter provision the household allowance shall be granted, first, to married officials and, secondly, to officials who are widowed, divorced, legally separated or unmarried, provided that they have one or more dependent children (Article 1 (2)). Where a husband and wife are both employed in the service of the Community the allowance is payable only to the person whose basic salary is the higher (Article 1 (4)).
- 3 On the basis of the foregoing provisions the applicant drew the household allowance until he informed the administration that he and his wife had been divorced on 8 August 1977. Following communication of that information and as the applicant had no dependent child payment of the household allowance was stopped with effect from January 1978.
- 4 In addition to the provisions referred to above Article 1 of Annex VII contains a paragraph (3) which limits the right to the household allowance. According to the version of that paragraph in force at that time, a married official with no dependent child who is in principle entitled to receive that allowance shall not receive it if the spouse is gainfully employed with an annual income, before deduction of tax, of more than Bfr 250 000. That figure was raised to Bfr 292 500 with effect from 1 November 1973 for officials employed in Belgium.

- 5 A check carried out when, following notification by the applicant, the administration ceased payment of the household allowance with effect from 31 December 1977, showed that from 1 July 1974 his wife's income had exceeded the upper limit laid down in Article 1 (3) of Annex VII to the Staff Regulations, with the result that from that date the household allowance had not been due to the applicant and had been paid to him in error.

- 6 In those circumstances the administration informed the applicant on 10 February 1977 that the sums overpaid would be recovered with the exception of those paid between 1 July and 31 December 1974 during which period his wife's salary had exceeded the upper limit in question only as a result of a retroactive readjustment. The appointing authority failed to reply to a complaint within the meaning of Article 90 of the Staff Regulations within the period of four months prescribed by that article with the result that on the expiry of that period its silence constituted the implied decision rejecting the complaint, annulment whereof is now sought together with that of the decision of 10 February 1977.

- 7 The applicant does not contest that the sums he received were paid without due reason but maintains that Article 85 of the Staff Regulations prevents their recovery. According to that provision: "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".

- 8 He also relied, in the alternative, on the breach of the principles of fairness and equality, inasmuch as he claimed that the undue payment was recovered from him whereas it was not recovered from other officials whose situation was similar. However, he abandoned that submission in the course of the proceedings when the allegation of a disparity between the measures adopted by the Commission proved to be incorrect.

- 9 Article 85 envisages two possible cases: First, where the recipient was aware that there was no due reason for the payment and, secondly, where the fact of the overpayment was "patently such" that he could not have been unaware of it. The applicant maintains that neither applies to his case.

- 10 The applicant states that he was not aware that the sums in question were paid in error. Although it may be seriously doubted whether such a statement is adequate and although a reasonable interpretation of Article 85 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.
- 11 In that connexion the applicant claims, first, that an error which the administration has itself committed over several years cannot be regarded as patent, particularly as it had full knowledge of the salary which it was itself paying to his wife. That argument cannot be accepted. It is not a question of whether the error was or was not patent to the administration, but whether it was so to the applicant and the situation of an administrative authority, which is responsible for the payment of thousands of salaries and allowances of all kinds, cannot be compared to that of an official who has a personal interest in checking the payments made to him each month.
- 12 Secondly, the applicant claims that the salary statements on which the amount of the allowance was indicated did not enable him to ascertain that it was irregular while on the other hand, "to calculate the upper limit on the income of one's spouse, above which the allowance is no longer paid . . . is complicated and would be a task for an expert".
- 13 The applicant cannot claim that he was unaware of the amount of the remuneration and other allowances received by his wife as an official of the Commission since until a short time before the divorce the salary of both parties was at their own request paid into the same bank account. Moreover, at the period in question Article 1 of Annex VII to the Staff Regulations stated in the form of a figure (Bfr 250 000 subsequently raised to Bfr 292 500) the upper limit on the spouse's income before deduction of tax above which payment of the household allowance ceases. Accordingly, where, as in this instance, the net amount of the spouse's remuneration, as indicated on the salary statement, already exceeded those upper limits by a considerable amount (the statement for January 1975 indicated a net monthly salary of Bfr 33 091) any normally careful official should clearly have been put on notice that his right to the household allowance was

doubtful and that it was, at the least, necessary to make a check. The term "patently such" in Article 85 of the Staff Regulations does not imply that the official who receives undue payment is exonerated from any 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.

- 14 All the circumstances of the case and the arguments relied on by the applicant show that if he did not become aware of the administrative error from which he benefited unduly that was only because he did not proceed to carry out checks with the ordinary degree of care to be expected of an official of his level who, furthermore, performed his duties at the Financing and Auditing Division of the European Agricultural Guidance and Guarantee Fund, which implies a knowledge of account enabling him to carry out the necessary check more easily.
- 15 It follows from the foregoing considerations that in this instance the Commission made a correct use of Article 85 of the Staff Regulations, with the result that the application must be dismissed.

Costs

- 16 Under Article 96 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs. As the applicant has failed in his submissions he must be ordered to pay the costs.

However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Mertens de Wilmars

O'Keefe

Koopmans

Delivered in open court in Luxembourg on 11 July 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS
DELIVERED ON 21 JUNE 1979¹

*Mr President,
Members of the Court,*

After the cases of *Meganck v Commission of the European Communities* (judgment of 30 May 1973, [1973] ECR 527) and *Kubl v Council of the European Communities* (judgment of 27 June 1973, [1973] ECR 705) I am giving for the third time my opinion in a case concerning the recovery of sums paid in error to an official of the Communities.

I — The dispute concerns the household allowance provided for in Article 67 (1) of the Staff Regulations of Officials. The conditions governing the grant of that allowance are laid down in Article 1 of Annex VII to the Staff Regulations, paragraph (3) of which, in the version in force at the time of the events in dispute, provided that:

“If the spouse of an official is gainfully employed, with an annual income, before deduction of tax, of more than

¹ — Translated from the French.