Evropský veřejný ochránce práv

Afgørelse i sag 1963/2009/ELB - Neposkytnutí příspěvku na pokrytí zvláštních výdajů

Rozhodnutí
Případ 1963/2009/ELB - **Otevřeno dne** 11/09/2009 - **Rozhodnutí ze dne** 16/12/2010

Stěžovatel je zaměstnancem Evropské komise. Ve služebním řádu se uvádí, že příspěvek vyplácený zaměstnanci na vyživované dítě může být zdvojnásoben, pokud jeho dítě trpí vážným onemocněním spojeným se značnými výdaji. U syna stěžovatele bylo vážné onemocnění diagnostikováno v roce 2006. Stěžovatel požádal o zdvojnásobení příspěvku na vyživované dítě.

Komise souhlasila se zdvojnásobením příspěvku pouze od roku 2008. Uvedla, že dvojnásobný příspěvek může vyplácet pouze od data, kdy o něj bylo požádáno. Argumentovala, že stěžovatel předložil žádost o dvojnásobný příspěvek až v roce 2008.

Veřejný ochránce práv předložil Komisi návrh na smírné řešení a požádal ji o opětovné zvážení jejího rozhodnutí. Zdůraznil, že stěžovatel může doložit, že ve skutečnosti požádal o dvojnásobný příspěvek v roce 2006, brzy poté, co bylo zjištěno, že jeho syn trpí vážným onemocněním.

Komise na základě důkazů předložených stěžovatelem souhlasila s poskytnutím dvojnásobného příspěvku od roku 2006. Stěžovatel byl s výsledkem spokojen a poděkoval veřejnému ochránci práv za pomoc při řešení této záležitosti.

Veřejný ochránce práv případ uzavřel jako vyřešený Komisí.

The background to the complaint

1. The complaint concerns the payment of an allowance which a Commission staff member claimed he was entitled to because of his son's serious illness.

2. The complainant is an official working at the European Commission. In 2006, he asked the Commission to recognise that his son was suffering from a serious illness. The complainant asked the Commission's medical officer if, as a result of this diagnosis, he could benefit from an increased allowance for a dependent child or any other financial assistance. In May 2006, the

Commission officially recognised that the complainant's son had a serious illness. As a result, his son's medical expenses were fully covered as from that date. However, the Commission did not reply to the complainant as regards his potential entitlement to an increased dependent child allowance.

3. In June 2008, the complainant requested the Commission to increase the dependent child allowance granted to him. A double allowance was granted to him as of 1 June 2008 [1] [Odkaz] . Given that the Commission refused to grant him the double allowance as of 2006, the complainant turned to the Ombudsman.

The subject matter of the inquiry

4. The Ombudsman opened an inquiry into the following allegation and claim.

Allegation:

The Commission failed to comply with its duty of care for the well-being of its staff.

In support of his allegation, the complainant argued that, when it accepted his request to recognise his son's serious illness, the Commission should also have provided him with information on the possibility to receive a double allowance for a dependent child.

Claim:

The Commission should pay him two years of double allowance for a dependent child and recalculate his salary payments from April 2006 to May 2008.

The inquiry

5. On 31 July 2009, the complainant addressed his complaint to the Ombudsman. On 11 September 2009, the Ombudsman opened an inquiry and forwarded the complaint to the Commission, which then sent its opinion to the Ombudsman on 3 December 2009. The opinion was forwarded to the complainant, who did not submit any observations.

6. On 4 October 2010, the Ombudsman made a friendly solution proposal to the Commission. On 8 November 2010, the Commission replied to the Ombudsman's proposal. The reply was forwarded to the complainant. On 24 November 2010, the Ombudsman's services telephoned the complainant to obtain his observations on the Commission's reply.

The Ombudsman's analysis and conclusions

A. Allegation of failure to comply with the duty of care for the well-being of staff and related claim

Arguments presented to the Ombudsman

7. The complainant alleged that the Commission failed to comply with its duty of care to its staff. In support of his allegation, he argued that, when it accepted his request to recognise the serious illness of his son, the Commission should have provided him with information on the possibility to receive a double allowance for a dependent child. The complainant claimed that the Commission should pay him two years of double allowance for his dependent child and recalculate his salary payments from April 2006 to May 2008.

8. In its opinion, the Commission explained that the practice agreed between the Office for Administration and Payment of Individual Entitlements (PMO) and the Medical Service is to grant the double allowance for dependent children as of the date an official makes a written request in this regard. The official should send the PMO a written request accompanied by a full and recent medical report. On the basis of these documents, the PMO creates a file and forwards it to the Medical Service. Following the opinion of the medical officer, the file is sent back to the PMO, which drafts a formal decision on the request.

9. The Commission further argued that, in accordance with the case-law of the Union courts [2] [Odkaz], the request could not be granted with retroactive effect from April 2006, given that it was made in June 2008.

10. The Commission added that the provision concerning the double allowance for a dependent child is clearly defined in the Staff Regulations (Articles 62, 67(1), and 67(3)). These provisions leave no room for interpretation. They are also available on the internal website of the Commission. In line with the general principle that nobody may ignore the law, the complainant cannot, according to the Commission, argue that the Medical Service or the Appointing Authority failed to provide him with relevant information, in order to explain why he did not request the double allowance when the serious illness of his son was diagnosed.

11. The Commission explained that, because of the rules on medical secrets, neither the medical officer nor the PMO could forward to other services information about the serious illness of the complainant's son.

12. The Commission agreed that, as the complainant pointed out, the case-law of the Union courts provides for the institution to exercise a duty of care towards its staff [3] [Odkaz]. This principle reflects the balance between the reciprocal rights and duties created by the Staff Regulations in the relationships between the public authority and its agents. This implies that, when an institution takes a decision regarding the situation of an official, it should take into account the interest of the service as well as the interest of the official [4] [Odkaz].

13. However, the Commission explained that, given the wide discretionary power of the

institutions in interpreting the interest of the service, the review of the Union courts is limited to assessing whether the institution acted within reasonable limits [5] [Odkaz] and did not use its discretionary power in a manifestly wrong way [6] [Odkaz]. In the present case, the Commission argued that it did not fail to comply with its duty of care and acted within reasonable limits. The complainant did not obtain information from the medical officer, whose role is not to provide such information in any event. Moreover, the complainant did not act for two years. In such circumstances, he should have turned, after a reasonable period of time, to the Directorate-General for Human Resources and Security (DG HR) or the PMO. The Commission accepted that if the facts had been technical and complex, it would not have expected the complainant to turn to DG HR or the PMO. However, the present case was rather simple.

14. The Commission went on to argue that the duty of care cannot result in the institution acting against the applicable provisions and norms [7] [Odkaz].

15. Even if there had been a lack of prior information, which was not the case, this would not have led to the annulment of the decision [8] [Odkaz].

16. Finally, the Commission pointed out that, according to established case-law, the provisions of Union law which give rise to allowances should be interpreted strictly [9] [Odkaz].

The Ombudsman's preliminary assessment leading to a friendly solution proposal

17. According to Article 67 of the Staff Regulations,

"1. Family allowances shall comprise:

... (b) dependent child allowances;...

3. The dependent child allowance may be doubled, by special reasoned decision of the appointing authority based on medical documents establishing that the child concerned is suffering from a mental or physical handicap which involves the official in heavy expenditure."

18. The Ombudsman noted that, in April 2006, when the complainant asked that the seriousness of his son's illness be recognised, he also asked to receive all benefits that were available to him. He stated the following:

"Je souhaiterais savoir si je peux bénéficier d'une augmentation de l'allocation pour enfant à charge - ou de tout autre compensation financière - étant donné que les frais relatifs à cette maladie sont lourds."

In the Ombudsman's view, the above statement, while understandably not specifically mentioning Article 67 of the Staff Regulations, must be understood as a request for the complainant to receive all benefits that were available to him, including the double allowance for

a dependent child, which was specifically mentioned in the complainant's letter of April 2006.

19. In September 2008, the complainant addressed his request to the PMO. On the basis of the information available to it at that time, the PMO considered the date of the complainant's " *initial request* " to be June 2008 (the PMO noted from the file available to it at the time that the complainant had contacted the medical officer in June 2008 to request the double allowance for a dependent child). However, on the basis of the evidence now brought forward by the complainant, the Ombudsman noted that the date of the " *initial request* " to the medical officer should have been April 2006. This was because it was on that date that the complainant took the initial step in the process of seeking the double allowance for a dependent child. While the entire process took two years to complete -because, as the Commission admitted, it never replied to the complainant's request of April 2006 [10] [Odkaz]- this delay in completing the process should not give rise to a loss for the complainant.

20. In light of the above, the Ombudsman made the preliminary finding that the Commission's failure to grant the allowance as from April 2006 amounted to an instance of maladministration. He therefore made the following proposal for a friendly solution below, in accordance with Article 3(5) of the Statute of the European Ombudsman:

"Taking into account the Ombudsman's findings, the Commission could reconsider its decision not to grant the complainant the double allowance for a dependent child as from April 2006."

The arguments presented to the Ombudsman after his friendly solution proposal

21. In its reply to the Ombudsman's proposal, the Commission noted that, in his letter to the medical officer dated April 2006, the complainant explicitly requested the double allowance for a dependent child. Given that (i) the medical officer was not competent to reply to this request, and (ii) the complainant did not subsequently contact the Commission's competent service, the Commission took the view that the complainant's request should have been forwarded internally to the competent service and dealt with within the statutory deadlines. The Commission accepted that the failure to forward the complainant's request to the competent service should not cause financial harm to the complainant. The Commission thus agreed to award the complainant the double allowance for a dependent child as from April 2006.

22. In his observations, the complainant informed the Ombudsman that he was satisfied with the Commission's reply. He thanked the Ombudsman for his work.

The Ombudsman's assessment after his friendly solution proposal

23. The Ombudsman welcomes the Commission's positive response to his friendly solution proposal. From the complainant's observations, he understands that the latter is satisfied with

the Commission's reply to the friendly solution proposal. He therefore concludes that a friendly solution to the complaint has been achieved.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

A friendly solution to the complaint has been achieved to the complainant's satisfaction.

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 16 December 2010

[1] [Odkaz] According to Article 67(3) of the Staff Regulations:

" *The dependent child allowance may be doubled, by special reasoned decision of the appointing authority based on medical documents establishing that the child concerned is suffering from a mental or physical handicap which involves the official in heavy expenditure.* "

[2] [Odkaz] Case 224/82 *Meiko-Konservenfabrik v RFA* [1983] ECR 2539. Paragraph 12 states that "as a general rule it is contrary to the principle of legal certainty for a Community measure to specify a date prior to its publication as the date on which it is to take effect."

Case T-237/00 *Reynolds v Parliament* [2005] ECR-SC I-A-385 and II-1731. Paragraphs 117 and 118 state the following (in the original French): "selon une jurisprudence constante, le retrait rétroactif d'un acte administratif conférant des droits subjectifs est soumis à des conditions très strictes...le seul argument du défendeur, selon lequel il est de pratique courante, pour l'administration, de prendre des actes concernant la carrière des fonctionnaires avec effet au premier ou au quinzième jour du mois pour faciliter le calcul des traitements ne justifie pas une exception au principe général de non-rétroactivité des décisions affectant la situation juridique et financière du destinataire…"

[3] [Odkaz] Case T-79/98 *Carrasco Benitez v EMEA* [1999] ECR-SC I-A-29 and II-127, paragraph 55; Case T-282/03 *Ceunik v Commission* [2005] ECR-SC I-A-235 and II-1075, paragraph 74.

[4] [Odkaz] Case 321/85 *Schwiering v Court of Auditors* [1986] ECR 3199, paragraph 18; Case C-298/83 P *Klinke v Court of Justice* [1994] ECR I-3009, paragraph 38; Joined cases T-33/89 and T-74/89 *Blackman v Parliament* [1993] ECR II-249, paragraph 96.

[5] [Odkaz] Case T-236/02 *Marcuccio v Commission* [2005] ECR-SC I-A-365 and II-1621. Paragraph 129 states the following (in the original French): "Selon une jurisprudence constante, le devoir de sollicitude de l'administration à l'égard de ses agents reflète l'équilibre des droits et obligations réciproques que le statut a créés dans les relations entre l'autorité publique et les agents du service public, mais les exigences de ce devoir ne sauraient empêcher l'AIPN d'adopter les mesures qu'elle estime nécessaires dans l'intérêt du service, puisque le pourvoi de chaque emploi doit se fonder en premier lieu sur l'intérêt du service. Compte tenu de l'étendue du pouvoir d'appréciation dont disposent les institutions pour évaluer l'intérêt du service, le Tribunal doit se limiter à vérifier si l'AIPN s'est tenue dans des limites non critiquables et n'a pas usé de son pouvoir d'appréciation de manière manifestement erronée."

[6] [Odkaz] Case T-3/96 *Haas v Commission* [1998] ECR-SC I-A-475 and II-1395. Paragraph 53 states the following (in the original French): "Compte tenu toutefois du large pouvoir d'appréciation dont disposent les institutions dans l'évaluation de l'intérêt du service, le contrôle du juge communautaire doit se limiter à la question de savoir si l'institution concernée s'est tenue dans des limites raisonnables et n'a pas usé de son pouvoir d'appréciation de manière manifestement erronée."

See also Case T-257/97 *Herold v Commission* [1999] ECR-SC I-A-49 and II-251, paragraph 99.

[7] [Odkaz] Case T-14/03 *Di Marzio v Commission* [2004] ECR-SC I-A-43 and II-167, paragraph 10; Case T-324/04 *F v Commission* [2007], paragraph 169; Case T-424/04 *Angelidis v Parliament* [2006] ECR-SC I-A-2-323 and II-A-2-1649, paragraph 122; and Case T-416/03 *Angelidis v Parliament* [2006] ECR-SC I-A-2-317 and II-A-2-1607, paragraph 117.

[8] [Odkaz] Case T-58/05 *Centeno Mediavilla e.a. v Commission* [2007] ECR II-2523. Paragraph 150 states the following: "However, although a shortage of prior information is such as to constitute an effective argument for the purpose of rendering the Community non-contractually liable towards the parties concerned, it is not in itself such as to render the contested decisions illegal."

[9] [Odkaz] Case T-66/05 *Sack v Commission* [2007], judgment of 11 December 2007, not yet reported in the ECR, paragraph 129; Case T-324/04 *F v Commission* , cited above, paragraph 110; Case F-85/06 *Bellantone v Court of Auditors* [2007], judgment of 9 October 2007, not yet reported in the ECR, paragraph 65.

[10] [Odkaz] The Ombudsman points out that this delay was not caused by the PMO. Once informed of the complainant's request, the PMO took steps to process the request without delay.