

## **Decision of the European Ombudsman on complaint 1303/2001/ME against the European Court of Justice**

Decision

**Case 1303/2001/ME - Opened on 12/10/2001 - Decision on 04/09/2002**

Strasbourg, 4 September 2002

Dear Mr Ö.,

On 7 September 2001, you made a complaint to the European Ombudsman concerning your request for parental leave to the Court of Justice of the European Communities.

On 12 October 2001, I forwarded the complaint to the President of the Court of Justice. The Court sent its opinion on 28 January 2002. I forwarded it to you with an invitation to make observations, which you sent on 21 March 2002.

I am writing now to let you know the results of the inquiries that have been made.

### **THE COMPLAINT**

The complainant lodged a complaint with the Ombudsman in September 2001, following the refusal by the Court of Justice of the European Communities to grant him two weeks of parental leave. The complainant worked as a temporary agent at the Court. On 9 September 1999, the complainant requested to obtain two weeks of parental leave for the period following his wife's confinement, foreseen for 25 September 1999. Alternatively, he requested to obtain two weeks of unpaid leave.

By decision of 27 September 1999, which was sent to the complainant on 29 September 1999, the Court granted the complainant two weeks of unpaid leave on personal grounds in accordance with Article 17 of the Conditions of employment of other servants of the European Communities. By letter of 22 December 1999, the complainant introduced a complaint in accordance with Article 90 of the Staff Regulations of officials of the European Communities, thereby challenging the decision to refuse him parental leave. On 25 January 2000, the Court sent an initial response explaining why it could not grant him parental leave. In its reasoned decision, which was taken on 14 March 2000, it rejected his complaint.

In his complaint to the Ombudsman, the complainant questioned the decisions of the Court of



Justice of 27 September 1999, 25 January and 14 March 2000 not to grant him parental leave. The complainant argued that the decisions were contrary firstly to Council Directive 96/34/EC (1) on parental leave, which *mutatis mutandis* can be considered applicable also to the Community institutions. Secondly, they were contrary to the general principles of Community law and lastly, to the principle of good administration, since the Court could have used its internal powers of decision-making, similar to the Court's internal decisions to grant leave to breastfeeding women and to define conditions for special leave.

As regards the general principles of Community law, the complainant put forward the following. The protection for men and women to reconcile family and working life has been recognised by the Court of Justice itself in cases C-1/95, *Gerster*, [1997] ECR I-5253, paragraph 38 and C-243/95, *Hill*, [1998] ECR I-3739, paragraph 42. The Community Charter of Fundamental Social Rights of Workers (2) establishes in paragraph 16 that measures must be taken so that women and men can reconcile their family and working life. Since the Court's refusal, the Council has adopted a resolution (3) acknowledging this principle as part of Community law. Furthermore, Article 33(2) of the Charter of Fundamental Rights of the European Union (4) prescribes that "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child".

In summary, the complainant alleged that the Court of Justice's decisions of 27 September 1999, 25 January and 14 March 2000 not to grant him parental leave were contrary to Community law.

The complainant claimed (i) that the Court restore the pension rights it deducted from his severance grant, (ii) that the Court adopt internal rules on parental leave until the Staff Regulations have been amended, and (iii) in case internal rules are adopted, that the Court grant him parental leave retroactively.

In the second place, the complaint was directed against the Commission and the Council for having failed to take the initiative and to decide on amending the Staff Regulations in order to assure its personnel the right to parental leave.

## THE INQUIRY

The Ombudsman decided to initiate an inquiry into the complaint as far as the allegation and claims against the Court of Justice were concerned. As far as the complaint was directed against the Commission and the Council, the Ombudsman informed the complainant that he could not deal with this part of the complaint as it was not preceded by the appropriate administrative approaches to these institutions, as required by Article 2(4) of the Ombudsman's Statute (5). The Ombudsman however informed the complainant that he had decided to initiate an own initiative inquiry against the Commission into the subject of parental leave for the officials and other servants of the European Communities (Case OI/4/2001/ME). The Ombudsman undertook to keep the complainant informed of the outcome of the own initiative



inquiry (6) . A copy of the decision following the inquiry in the own initiative was sent to the complainant on 26 February 2002.

#### **The Court of Justice's opinion**

The complaint was sent to the Court of Justice who provided the following opinion. The Court firstly referred to the Ombudsman's Annual Reports and the definition of the term maladministration contained therein. The Court concluded that it should look at whether the contested decisions breach any rule or principle which is binding upon the Court.

The Court stated that the complainant had stressed that it had breached Council Directive 96/34/EC, general principles of Community law and the principle of good administration. As the Court already had said in its decision of 14 March 2000, no right to the kind of parental leave the complainant had asked for is laid down in the Staff Regulations of officials of the European Communities, in the Conditions of employment of other servants of the European Communities or in the provisions implementing the same. Furthermore, in the letter of 25 January 2000, it was stated that, if the mentioned Directive were to be binding upon the Community institutions (as regards this issue, see case T-51/98, *Burrill* , [1999] ECR-SC IA-203; II-1059), it would in any case require the institutions to take measures to incorporate the Directive so that the appointing authority competent to grant the leave would be able to apply the Directive in a specific case. However, no such measures had been taken.

The Court stated that it could not grant the complainant leave on the basis of the Charter of Fundamental Rights of the European Union or the Community Charter of Fundamental Social Rights of Workers, as these at present are not binding texts. Finally, at its present state of development, the Community Courts have not considered that any general principle of Community law regarding the right to parental leave exists.

In accordance with its decisions, the Court was only entitled to grant special leave of up to two days following the birth of a child. There was thus no legal support to grant the complainant the parental leave he requested, thereby charging the Community budget. In order to meet the complainant's demand of taking care of his child, two weeks of unpaid leave were granted to him within the Court's wide margin of discretion.

The Court concluded that the allegations of the complainant were unfounded, that the contested decisions did not constitute maladministration and that the claims put forward should be rejected.

#### **The complainant's observations**

The Court's opinion was forwarded to the complainant who submitted the following observations.

The complainant stated that the Court of Justice had not yet examined whether there is a general principle of Community law of right to parental leave but it had clearly recognised that the general principle of the protection of men and women, both in family life and in the workplace, is part of Community law (See cases C-1/95, *Gerster* , [1997] ECR I-5253, paragraph 38 and C-243/95, *Hill* , [1998] ECR I-3739, paragraph 42). The complainant put forward that the Court had recently established that every employees' right to paid vacation is a



principle that plays an important role within the Communities labour legislation (7) . A minimum requirement of at least four weeks paid vacation follows from Directive 93/104/EC (8) , which ensures the employees' security and health. This reasoning is by analogy applicable to Directive 96/34/EC on parental leave. The employees' right to paid parental leave is thus a basic social right within Community law and the Directive lays down minimum criteria therefore. This is further strengthened by Article 33(2) of the Charter of Fundamental Rights of the European Union. Even if the Charter on Fundamental Rights of the European Union and Directive 96/34/EC do not prescribe *paid* parental leave, the Directive nevertheless clearly and unconditionally foresees that the parental leave should not influence the employees' pension rights and social protection. The fact that the Court granted unpaid leave cannot be considered as a fulfilment of the minimum requirements foreseen by the Directive.

The complainant also put forward that it cannot be excluded that the failure by the EU institutions not to fulfil the requirements of Directive 96/34/EC constitutes discrimination according to Articles 12, 17(2) and 141 of the EC-Treaty as well as Directive 76/207/EC on equal treatment in employment (9) . In practise, this failure means that male EU officials are prevented from taking the same responsibility for their children as male EU citizens (compare with the judgement of 19 March 2002 in case C-476/99, *Lommers* , paragraph 49, not yet reported in the ECR). Their children are furthermore discriminated against compared to children from other EU citizens. As regards women who found a family with an EU official, they are faced with more difficulties to reconcile their working and family life. It is also contrary to Article 6 of Council recommendation 92/241/EEC on child care (10) and at the same time, the rights of women to compete on the labour market under the same conditions as men are not safeguarded (see the *Lommers* case above).

As regards the failure by the competent authority to take measures to incorporate Directive 96/34/EC, the complainant pointed out that it is exactly this failure by the Court that constitutes maladministration. The failure by the Commission and the Council to amend the Staff Regulations is no excuse for the Court or other institutions not to fulfil the minimum requirements of the Directive. In this context, the Court's interpretation comes across as manifestly unlawful. The fact that two days of special leave can be granted following the birth of a child can never mean that the Court, within its internal decision-making powers and wide discretionary powers, would be prevented from granting further parental leave or from incorporating the Directive. In this regard, it should be mentioned that the Court in 1999 issued rules on leave for breastfeeding mothers even if such leave is not foreseen by the Staff Regulations.

The complainant pointed out that he did not accept the Court's statement that the parental leave would charge the Community budget as an argument to justify its failure to live up to the standards of Directive 96/34/EC. Even two weeks of fully paid leave would not have been an additional expense to the budget, especially bearing in mind the limited possibilities that exist in carrying over allowances from one year to the next.

The complainant also informed the Ombudsman that the Swedish social insurance office had denied him the right to parental leave in excess of the so called "guaranty level" because he had



not been insured in Sweden for 240 days before the birth of his son. This is being pursued by the complainant in the Swedish courts.

The complainant concluded that the Court's failure to grant its staff due parental leave constitutes an instance of old-fashioned maladministration.

## THE OWN INITIATIVE INQUIRY

In the own initiative inquiry OI/4/2001/ME against the Commission into the subject of parental leave for the officials and other servants of the European Communities, the Ombudsman took a decision to close the case on 26 February 2002 (11) .

During the inquiry, the Commission informed the Ombudsman of its efforts to amend the Staff Regulations in order to guarantee parental leave for officials and other servants of the European Communities. In the decision, the Ombudsman welcomed the Commission's intention to put such rules in place without delay. The Ombudsman noted that the Commission's proposal respected Directive 96/34/EC on parental leave and the Charter of Fundamental Rights of the European Union. The Ombudsman concluded that the Commission was taking steps that would likely remedy the lack of adequate rules on parental leave in the near future. The Ombudsman therefore took the view that his own-initiative inquiry had achieved its purpose and that there was no need to pursue it further. The Ombudsman stated that he would continue to follow the development of the matter.

## THE DECISION

### **1 The Court of Justice's decision not to grant the complainant parental leave**

1.1 The complainant was a temporary agent at the Court of Justice. He requested two weeks of parental leave following the birth of his child in September 1999. The Court denied him parental leave but granted him two weeks of unpaid leave. The complainant alleged that the Court of Justice's decision not to grant him parental leave was contrary to Community law. He argued that the decision was contrary to Council Directive 96/34/EC (12) on parental leave; to general principles of Community law as recognised in the Community Charter of Fundamental Social Rights of Workers and the Charter of Fundamental Rights of the European Union; and to the principle of good administration, since the Court could have used its internal powers of decision-making to define conditions for special leave. The complainant claimed that the Court should: (i) restore the pension rights it deducted from his severance grant; (ii) adopt internal rules on parental leave until the Staff Regulations have been amended; and (iii) grant him parental leave retroactively, in case internal rules are adopted.

1.2 The Court rejected the complainant's allegation and claims as unfounded. According to the Court, no right to the kind of parental leave the complainant had asked for is laid down in the Staff Regulations of officials of the European Communities. If Directive 96/34/EC were binding upon the Community institutions, it would in any case require measures to incorporate the Directive, but no such measures have been taken. As regards the Charter of Fundamental



Rights of the European Union and the Community Charter of Fundamental Social Rights of Workers, the Court argued that these are not binding. Furthermore, the Community Courts have not considered that any general principle of Community law exists regarding the right to parental leave.

1.3 The Ombudsman notes that the Staff Regulations contain no right to parental leave, but foresee only the possibility to grant two days of special leave following the birth of a child (Article 6 of Annex V). Following an own-initiative inquiry by the Ombudsman, the Commission has proposed amendments to the Staff Regulations to include the right to parental leave. These amendments include the right of two weeks paid parental leave. The Ombudsman regrets the length of time taken to bring into force a provision defining the right to parental leave for staff of the European Communities. The Ombudsman is not aware, however, of any evidence that this delay could be attributed to the Court of Justice.

1.4 The Ombudsman considers that the complainant's arguments concerning the principle of parental leave do not establish that Community law as it stands gives him the right to two weeks parental leave. The Ombudsman therefore finds no maladministration in the Court's decision not to grant the complainant two weeks parental leave. The complainant's claims cannot, therefore, be sustained.

## **2 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Court of Justice. The Ombudsman therefore closes the case.

The President of the Court of Justice will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/4.

(2) COM(89)471 Final.

(3) Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life, OJ 2000 C 218/5.

(4) Charter of Fundamental Rights of the European Union, OJ 2000 C 364/1.

(5) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15.



(6) Own initiative inquiry OI/4/2001/ME was closed on 26 February 2002. The decision closing the inquiry can be found on the Ombudsman's Website: <http://www.ombudsman.europa.eu>

(7) Case C-173/99, Bectu, [2001] ECR 2001 I-4881, paragraphs 43-48.

(8) Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ 1993 L 307/18.

(9) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40.

(10) 92/241/EEC: Council recommendation of 31 March 1992 on child care, OJ L 1992 123/16.

(11) The decision closing the inquiry can be found on the Ombudsman's Website:  
<http://www.ombudsman.europa.eu>

(12) Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/4.