

Decision of the European Ombudsman on complaint 1540/2001/JMA against the European Commission

Decision

Case 1540/2001/JMA - Opened on 05/12/2001 - Decision on 29/10/2002

Strasbourg, 29 October 2002

Dear Mr M. F.,

On 28 October 2001, you lodged a complaint with the European Ombudsman against the European Commission, on behalf of the "*Asociación para la Defensa de los Derechos Civiles en España*". The complaint concerned the alleged failure of the European Commission to properly consider the facts denounced in a formal complaint (00/4989).

You sent additional information on 4, 11, 15 and 19 November 2001. On 5 December 2001, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 27 February 2002. On 21 March 2002, I forwarded the Commission's opinion to you with an invitation to make observations if you so wished. I received additional information from you on 8 April 2002. On 9 and 10 April 2002, you sent me your observations on the Commission's opinion. I requested further information from the Commission on 24 May 2002. The Commission sent its second opinion on 2 July 2002, which I forwarded to you. You sent me your observations on the Commission's second opinion on 12 August 2002.

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

THE COMPLAINT

According to the complainant, the facts were as follows:

On 4 May 2000, the complainant, on behalf of an association for the defence of human rights, lodged a formal complaint with the European Commission through the Eurojus office in Madrid. The Commission assigned the matter to the responsible services in DG Employment and Social Affairs, and registered it under file number 2000/4989. The complaint concerned the alleged discriminatory nature of the Spanish legislation on insurance (Spanish Law 30/1995 and its implementing rules), in particular its provisions on retirement plans for workers employed in the financial sector. According to the complainant, the Spanish legislation does not comply with Community law, since it unduly restricts the free movement of workers.



The complainant explained that as a result of Spanish Law 30/1995 the complementary insurance plans paid for by workers employed in the financial sector, cannot be transferred in the event of a change of employment. As a consequence, people working for financial institutions in Spain are prevented from changing firms since they risk losing part of the pension rights they have been contributing to. In the complainant's view, the Spanish law discriminates against workers in the financial sector, and is therefore contrary to the basic principle of free movement enshrined in Art. 7 (now 14) of the EC Treaty. He added that the national legislation also constitutes an obstacle to the free movement of workers, in breach of Art. 48 (now 39) of the EC Treaty, as interpreted by the Community courts. The complainant pointed out to several Community courts' rulings, in particular to the considerations made in point 96 of the *Bosman* case (1) .

The complainant noted that the Spanish legislation at stake did not respect either the provisions of secondary Community legislation, in particular of Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

Despite the legal arguments put forward by the complainant, the Commission wrote to the complainant on 10 May 2001 informing him that they intended to close the case unless he provide additional information. In his reply dated 8 August 2001, the complainant spelled out the facts and points of law of his complaint, and requested clear explanations from the Commission on the compatibility of Spanish law 30/1995 with, (i) different provisions of Directive 98/49/EC; (ii) Arts. 7 (now 14) and 48 (now 39) of the EC Treaty; (iii) as interpreted in the relevant case-law of the Community courts, in particular in the *Bosman* ruling; and (iv) the policy announced by the institution in its Green Paper on supplementary pensions in the Single Market (COM (97) 283).

In the absence of a reply from the Commission, the complainant wrote to the Ombudsman. He believed that the institution was trying to close the case without properly assessing the allegations he had made.

In summary, the complainant alleged that the Commission did not address the primary claim of his complaint, namely that the Spanish legislation on insurance (Law 30/1995 and the implementing rules) does not comply with Community law, since it unduly restricts the free movement of workers employed in the financial sector.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission described the background to the case. It explained that the complainant first brought to its attention the problems posed by the Spanish law on insurance in May 2000. On 25 October 2000, the complainant's letter was registered as a formal complaint under file number 2000/4989.



By letter dated 9 January 2001, the Commission services informed the complainant that they did not consider the relevant Spanish legislation contrary to Community law, and that they intended therefore to close the case. They explained that the situations governed by Directive 98/49/EC were different from those under the Spanish law. Furthermore, the Directive would not be applicable to the case since its provisions were to be incorporated into Spanish law by 25 January 2002.

On 9 January, 25 February and 2 March 2001, the complainant wrote again to the Commission including with his letter a copy of a Spanish Supreme Court's ruling concerning the legality of the Spanish law on insurance. Having reviewed this document, the Commission confirmed its previous assessment of the compatibility of the Spanish legislation with current EC law in a letter dated 7 March 2001. The complainant forwarded a number of rulings by different Spanish courts on 24 March and 29 April 2001. The Commission acknowledged the new information by letter of 10 May 2001, which pointed out that all the rulings had been decided by reference to the Spanish legal system, and thus that they had no bearing on the application of Community law to the problem. On that basis, the Commission confirmed its previous stand whereby Community law, in its current form, does not require national firms to set up special reserve funds in the event of employees' departure. On 18 July 2001, the Commission closed complaint 2000/4989.

The complainant addressed the Commission by letter of 8 August 2001. He lodged a new complaint with the institution concerning the same subject matter. Following a further exchange of correspondence, the Commission replied on 15 November 2001. In its letter, the institution reviewed the allegations made by the complainant, and confirmed its position. It explained that the Spanish legislation was not in breach of Directive 98/49/EC, since, as set out in Art. 4, the Directive only applied to workers moving from one Member State to another, and not to purely internal situations, as in the complainant's case. The Commission underlined that the Treaty provisions did not impose stricter obligations on Member States. As regards the potential relevance of the Commission's Green Paper on supplementary pensions, the letter referred to its non-binding nature.

The Commission's opinion therefore concluded that the procedure followed by its services in this case had been adequate. It stressed that its services had always kept the complainant informed of any development, and promptly replied to his queries. The Commission considered that the problem did not result from an incorrect assessment of the legal arguments put forward by the complainant, but rather from a divergent legal interpretation of the applicable Community rules. In the Commission's view, Community law, in its current form, does appear to call into question the validity of the Spanish legislation on insurance.

The complainant's observations

On 27 March 2002, the complainant forwarded a decision adopted by the Spanish Ombudsman in relation to the case submitted by the complainant to that institution, and which also concerns Spanish Law 30/1995 on insurance. In his decision, the Spanish Ombudsman concluded that the legislation in cause effectively discriminated against workers in the financial sector, and therefore recommended that the Spanish government take the necessary steps to have the relevant legislation amended. A copy of the decision had also been sent by the complainant to



the Commission.

On 10 April 2002, the complainant sent his observations on the Commission's opinion. He repeated the allegations made in the complaint to the Ombudsman, and stressed that the institution had failed to properly assess them. Thus, he considered that the closing of his complaint had been unfounded. The legal arguments set forth in his letters, in particular that of 8 August 2002, have remained unanswered. He included with his observations copies of all the exchanges with the Commission.

For the complainant, the Commission's recurrent statement that the Spanish law on insurance was not contrary to Community law had not been accompanied by any supportive argument.

In the absence of any reasoning, the complainant believed he had been prevented from defending his position and thus responding to the Commission's stance. He found it peculiar that despite the reference to EC law made in different Spanish courts' rulings, the Commission still held that there was no Community aspect in his complaint. Among the documentation enclosed with his observations, the complainant included a judgement rendered by the Barcelona Labour Court. In point 21 of the ruling, the Court decided that the Spanish legislation on insurance was contrary to the EC principle of free movement of workers, because it restrained Spanish workers in the financial sector from moving to any other Member State. In its support, the Labour Court referred to the European Court of Justice's consideration in the *Bosman* ruling, in particular to paragraph 96.

In the complainant's view, none of the letters from the Commission had addressed the question of whether the Spanish legislation conform with Community law as defined by the case-law of Community courts.

FURTHER INQUIRIES

In view of the observations submitted by the complainant, the Ombudsman wrote to the Commission on 24 May 2002. In his letter, the Ombudsman requested further information on the aspects outlined by the complainant in his observations. In particular the Ombudsman invited the Commission to comment on the complainant's argument whereby the institution had failed to address any reasoning in support of its position.

The Commission's second opinion

The Commission explained that the observations made by the complainant did not add any new element to the case. It recalled that its services had informed the complainant of the reasons which led them to conclude that the Spanish legislation was not contrary to EC law. The Commission referred to its letter of 15 November 2001 in which, detailed reasoning had been furnished on the compatibility of the Spanish law with both Directive 98/49/EC and with the relevant Treaty provisions, in particular Art 49 (now 39), as interpreted by the Community courts, in particular in the *Bosman* case. On the basis of a thorough analysis, its services had not identified any legal basis to pursue an infringement proceeding against Spain.



The institution repeated the conclusions stated in its previous opinion.

The complainant's observations on the Commission's second opinion

On 12 August 2002, the complainant sent his observations on the Commission's second opinion. He considered that the Commission had not added any further information in its second opinion, and that the points of law raised in his letter of 8 August 2001 remained unanswered. In his view, the allegations made in his complaint to the Commission had been replied to with generalities lacking any supportive reasoning.

THE DECISION

1 Commission's handling of the complaint submitted by the complainant

1.1 The complainant alleged that the Commission did not address the primary claim of his complaint, namely that the Spanish legislation on insurance (Law 30/1995 and the implementing rules) does not comply with Community law, since it unduly restricts the free movement of workers employed in the financial sector. He considered that the closing of his complaint had been unfounded.

The complainant argued that the legal arguments set forth in his exchanges with the institution, in particular in his letter of 8 August 2001, had not been replied to. In the absence of any reasoning, the complainant believed that he had been prevented from defending his position and thus responding to the Commission's position.

1.2 The Commission has maintained that Community law, in its current form, does appear to call into question the validity of the Spanish legislation on insurance. It underlined that the facts denounced by the complainant referred to a purely internal situation. In its view, the problem did not result from an incorrect assessment of the legal arguments put forward by the complainant, but rather from a divergent legal interpretation of the applicable Community rules.

It recalled that its services had informed the complainant of the reasons which led them to conclude that the Spanish legislation was not contrary to EC law. The Commission referred to its letter of 15 November 2001 in which it had furnished detailed reasoning in support of its position.

1.3 The Ombudsman notes that the issue under dispute is whether the Commission properly reasoned its decision in this case. It is to be underlined that the obligation to give reasons for decisions is a basic component of the right to good administration. The Charter of Fundamental Rights of the European Union has enshrined this principle in Art. 41, par. 2. The Commission's Code of Good Administrative Behaviour also includes the duty to justify decisions, stating that (2) , The same principle applies in the context of formal complaints addressed to the Commission, as the institution agreed in its latest communication on relations with the complainant in respect of infringements of Community Law (3) .

1.4 From the information submitted to the Ombudsman, it appears that the allegations made by the complainant, and summed up in his letter of 8 August 2001, referred to the violation by the Spanish law on insurance of the following Community rules and principles: (i) the provisions of



Directive 98/49/EC; (ii) Arts. 7 (now 14) and 48 (now 39) of the EC Treaty as interpreted (iii) by the case-law of the Community Courts, in particular in the *Bosman* ruling; and (iv) the policy announced by the institution in its Green Paper on supplementary pensions in the Single Market (COM (97) 283).

The Commission's basic argument has been all along that Community law, in its current form, does not appear to call into question the validity of the Spanish legislation on insurance. Its reasoning was grounded on the fact that the conditions denounced by the complainant referred to a purely internal situation. In its letters of 9 January, 7 March, 10 May and 15 November 2001 the institution appeared to have addressed in detail the compatibility of the Spanish legislation on insurance with (i) Directive 98/49/EC (4) , (ii) the relevant Treaty provisions, as (iii) interpreted by the Community courts (5) , and with (iv) several other EC legal instruments (6) .

1.5 The Ombudsman notes that the Commission explained its legal position as regards the situation, and addressed in fact all the allegations made by the complainant. In view of the evidence submitted in the course of the inquiry, it appears therefore that the institution gave a reasonable explanation of the reasons for which the facts and points of law put forward in his complaint failed to demonstrate an infringement of EC law.

The Ombudsman finds therefore no maladministration in relation to this aspect of the case.

2. Conclusion

On the basis of the European Ombudsman's inquiry into this complaint, there appears to have been no maladministration by the European Commission.

The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Case C-415/93 *URB v Jean-Marc Bosman* [1995] ECR I- 4921. Par. 96 states as follows, *"Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned"*.

(2) "[A] Commission decision should clearly state the reasons on which it is based [...]. As a general rule, full justification for decisions should be given"; Commission Decision of 17 October 2000 amending its Rules of Procedure (2000/633/EC, ECSC, Euratom); OJ L 267/63 of 20.10.2000.

(3) Commission Communication to the European Parliament and the European Ombudsman



on relations with the complainant in respect of infringements of Community Law (COM (2002) 141fin, of 20.03.2002).

(4) Directive 98/49/EC was not applicable to the complaint. Whilst the facts denounced by the complainant referred to a purely internal situation, the aim of the Directive -as set out in its Art. 4- is to protect the rights of members of supplementary pension schemes who move from one Member State to another. The Directive, on the other hand, had to be transposed into national law by 25 January 2002, and thus was not applicable at the time the complainant lodged his complaint (Commission's letters of 9 January and 15 November 2001).

(5) Treaty provisions cannot be applicable to the facts denounced by the complainant, since they do not create stricter obligations than those from secondary Community law (Commission's letter of 15 November 2001).

(6) The Commission's Green Paper on supplementary pensions in the Single Market, as well as its recommendation 92/442/EEC are of no legal relevance to the case because of their non-binding nature (Commission's letter of 15 November 2001).