

Decision of the European Ombudsman on complaint 1166/2002/(SM)IJH against the European Commission

Decision

Case 1166/2002/IJH - Opened on 25/07/2002 - Decision on 01/07/2003

Strasbourg, 1 July 2003

Dear Mrs T.,

Please note that Mr Jacob Söderman has retired and that, from 1 April 2003, I am his successor as European Ombudsman.

On 17 June 2002, you complained to the European Ombudsman against the European Commission's refusal to pay a secretarial allowance to you retrospectively.

On 25 July 2002, the complaint was forwarded to the President of the Commission. The Commission sent its opinion on 28 November 2002. This opinion was forwarded to you on 10 December 2002 with an invitation to make observations, which you sent on 29 January 2003.

On 6 March 2003, a proposal for a friendly solution to your complaint was made to the Commission. On 23 May 2003, the Commission sent its reply to this proposal. On 2 June 2003, you informed my services by telephone that you consider that a friendly solution has been achieved.

I am writing now to confirm the result of the inquiries that have been made.

THE COMPLAINT

The complainant is a former agent of the Commission. From 1 May 1995 to 30 April 1998, she worked as an auxiliary agent. From 15 May 1998 to 15 May 2001, she worked as a temporary agent. During her period as an auxiliary agent, the complainant received a secretarial allowance under Article 4a of Annex VII of the Staff Regulations and Article 21 of the Conditions of Employment of Other Servants of the European Communities. At the start of her temporary contract, the Commission ceased to pay the secretarial allowance. The complainant did not notice this omission.

Approximately one month before the end of her temporary contract, the complainant received



an official note informing her that she should have received the secretarial allowance during her temporary contract. However, the secretarial allowance was in fact granted to her only from 1 January 2001 to 15 May 2001.

The complainant submitted an appeal under Article 90 of the Staff Regulations against the decision to pay her the secretarial allowance only from 1 January 2001 rather than from the beginning of her temporary contract, that is to say 15 May 1998. In response, the Commission agreed to pay to the complainant half of the secretarial allowance for the period from 15 May 1998 to 31 December 2000.

On 17 June 2002, the complainant complained to the Ombudsman against the Commission's refusal to pay her the whole amount of the secretarial allowance to which she was entitled from 15 May 1998 to 31 December 2000. She claimed that the Commission should pay her this amount retrospectively.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made, in summary, the following points:

The complainant's tasks over the period 1995-2001 remained unchanged. She received the secretarial allowance as an auxiliary (1995-1998) but not as a temporary agent (1998-2000). In April 2001, her Directorate General made a request for her to be paid the allowance and it was paid for the year 2001.

The complainant is time-barred from contesting the decision, clearly notified to her in a document she signed in May 1998, not to pay her a secretarial allowance when she became a temporary agent. Moreover, her pay slips from June 1998 onwards differed in that respect from her pay slip of April 1998.

Furthermore, in terms of personal responsibility and liability in negligence in failing to notice the contents of the document setting out her rights she signed in May 1998, the change to her pay slip and the corresponding reduction of her earnings and on the basis of the test of the reasonable and prudent person, the complainant contributed to the failure to pay her the sums due to her at the time.

However, in the decision addressed to her on 29 April 2002 replying to her complaint, she was granted half the value of the allowance on the grounds that, although, in terms of a potential claim in negligence, she had contributed to her loss, the Commission's services also bore a share of responsibility in failing to secure her the allowance at the time.

The complainant's observations

In her observations, the complainant made the following points:

For the complainant's first contract, all steps were correctly taken in order for her to benefit from the allowances due. She thus had no reason to doubt the accuracy of the encoding of her data



when she signed the temporary contract. She honestly believed that all information given to the responsible official would be taken into account, in particular the fact that she was to perform the same tasks as before, that she would continue to work in the same unit and that it was only a change in contract.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman did not consider that the Commission had responded adequately to the complainant's claim. In accordance with Article 3 (5) of the Statute (1) , he therefore wrote to the President of the Commission to propose a friendly solution on the basis of the following analysis of the issues in dispute between the complainant and the Commission.

1. The claim for retrospective payment of a secretarial allowance

1.1 The complainant alleges that the Commission failed to pay her the entire amount of the secretarial allowance to which she was entitled from 15 May 1998 to 31 December 2000. She claims that the Commission should pay her this amount retrospectively.

1.2 The Commission acknowledges that the complainant's tasks remained unchanged when her contract changed from auxiliary to temporary. The Commission argues that the complainant is time-barred from contesting the decision not to pay the secretarial allowance to her as a temporary agent and that, in terms of a potential claim in negligence, she contributed to her loss because she signed a document which confirmed that the secretarial allowance would not be paid. She also received pay slips which did not mention the secretarial allowance. However, since the Commission's services also bore a share of responsibility, the Commission granted the complainant half the value of the allowance.

1.3 The Ombudsman notes that the Commission accepts that the complainant was entitled to claim the secretarial allowance during the whole period in question and that the Commission has not argued that any rule or principle prevents it from paying retrospectively the whole allowance to which the complainant was entitled.

1.4 The Ombudsman also notes the Commission's argument that the complainant was guilty of contributory negligence. The Commission does not argue, however, that the complainant failed to perform any of her tasks as an auxiliary or temporary agent, or to comply with her obligations under the Staff Regulations. From the available evidence, it appears that the Commission initiated the complainant's change of status from auxiliary to temporary agent. Finally, the Ombudsman notes that the complainant has not claimed interest. Thus, even if the Commission pays the full allowance, as the complainant claims it should, the complainant will still suffer financial loss as a result of her failure to use earlier opportunities to correct the Commission's error.

1.5 In the light of the above, the Ombudsman's provisional conclusion was that the Commission's decision to award the complainant only half the allowance could appear arbitrary



and unfair and that the Commission should therefore carefully re-examine its position in the specific circumstances of this case.

The proposal for a friendly solution

The European Ombudsman suggested that the Commission should take action to avoid the appearance of arbitrariness and unfairness by considering, in the specific circumstances of this case, whether to pay the full amount of the secretarial allowance for the period in question.

The Commission's response

In reply to the Ombudsman's proposal, the Commission points out that it has no legal obligation towards the complainant, who did not contest the decisions within the prescribed deadlines. The Commission considers, however, that in view of the points made by the European Ombudsman, the present case is exceptional and justifies the granting of an additional *ex gratia* compensation.

The complainant's observations

On 2 June 2003, the complainant informed the Ombudsman's services by telephone that she considers that a friendly solution has been achieved.

THE DECISION

1. The claim for retrospective payment of a secretarial allowance

1.1 The complainant alleges that the Commission failed to pay her the entire amount of the secretarial allowance to which she was entitled. She claims that the Commission should pay her this amount retrospectively.

1.2 After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman wrote to the President of the Commission to propose a friendly solution in accordance with Article 3 (5) of the Statute.

1.3 In reply to the Ombudsman's proposal, the Commission pointed out that it had no legal obligation towards the complainant, who did not contest the decisions within the prescribed deadlines. The Commission considered, however, that in view of the points made by the European Ombudsman, the present case was exceptional and justified the granting of an additional *ex gratia* compensation.

1.4 The complainant informed the Ombudsman that she considers that a friendly solution has been achieved.

2. Conclusion

Following the Ombudsman's initiative, it appears that a friendly solution to the complaint has been agreed between the Commission and the complainant. The Ombudsman therefore closes the case.

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

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) “As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.”