Decision of the European Ombudsman on joint complaints 2210/2003/MHZ, 2211/2003/MHZ and 2212/2003/MHZ against the Council of the European Union

Decision
Case 2210/2003/MHZ - **Opened on** 10/12/2003 - **Decision on** 07/10/2004

Case 2211/2003/MHZ - **Opened on** 10/12/2003 - **Decision on** 07/10/2004

Case 2212/2003/MHZ - **Opened on** 10/12/2003 - **Decision on** 07/10/2004

In November 2001, the complainant received a personalised note, numbered SN 3736/01, from the Head of the Health Insurance Office. The note informed her that as of 31 December 2001, her child would be covered by the Belgian social security system and that the Joint Sickness Insurance Scheme would only provide cover on a complementary basis.

On 14 December 2001, the complainant, together with two other Council officials, wrote a joint letter to the Deputy Director General for Personnel and Administration, in which she commented on the discriminatory nature of the note and contested its legal force. The Deputy Director's reply did not address the complainant's request for an advisory opinion from the Council's Legal Service, but instead advised her to contact the Head of the Health Insurance Office. The complainant therefore contacted the Staff Committee, which unsuccessfully attempted to arrange a meeting between the complainant and the Deputy Director General. Given that the complainant did not consider herself bound by note SN 3736/01, she continued to submit applications for reimbursement of her child's medical expenses. On28 March 2003, the complainant's application for reimbursement was refused for the first time.

On 7 November 2003, the complainant lodged a complaint with the European Ombudsman. Given that the two other above-mentioned Council officials submitted complaints on the same date concerning the same matter, the three complaints were treated jointly. In her complaint to the Ombudsman, the complainant stated that note SN 3736/01 was in conflict with the Staff Regulations, discriminatory and not legally binding. She claimed that her child should be entitled to the same primary medical cover as the children of other EU staff members.

In its opinion on the complaint, the Council explained its handling of the matter. It stated that the complainant had not formally contested the decision contained in note SN 3736/01. Nor did she contest, within the statutory period, the decisions refusing reimbursement taken by the Health

Insurance Office.

The Council referred to Art. 72 (1) of the Staff Regulations and Art. 6 of the Rules on Sickness Insurance for Officials of the European Communities, according to which officials' children's medical expenses may only be reimbursed if the official has not received or cannot claim any reimbursement from any other sickness insurance scheme. Annexed to its opinion, the Council submitted a copy of a statement from the Belgian National Sickness Invalidity Insurance Institute. The statement explained that Belgian health insurance is compulsory for a child whose parent is covered by this insurance, even if the other parent is an EU official.

Finally, the Council questioned the admissibility of the complaint to the Ombudsman, given that the complainant had not lodged an internal administrative complaint with the appointing authority under Art. 90 (2) of the Staff Regulations. The complainant's approaches to the Deputy Director General and to the Staff Committee could not be considered as equivalent to an administrative complaint.

The complainant responded to the Council's opinion and stated that the letter sent to the Deputy Director General on 14 December 2001 should be considered a request for information and not a complaint.

The Ombudsman therefore re-evaluated the admissibility of the complaint. Although, when opening the inquiry, the Ombudsman had given the complainant the benefit of the doubt and concluded that the letter to the Deputy Director General did constitute a complaint, this was no longer possible following the complainant's observations in this regard. The Ombudsman therefore concluded that the complaint was in fact inadmissible, as the complainant had not exhausted the possibilities offered by Article 90 (2) of the Staff Regulations. The Ombudsman therefore considered the case to have been dropped by the complainant and did not continue his inquiries into the complainant's allegations and claims.

Strasbourg, 7 October 2004
Dear Mrs F.,

On 7 November 2003, you made a complaint to the European Ombudsman against the Council of the European Union, concerning the decision of the Council of the European Union, namely note SN 3736/01 dated 11 September 2001, which prescribed for your child the Belgian insurance scheme as obligatory and the Joint Sickness Insurance Scheme as complementary.

Given that Mrs G. and Mr T. submitted to the European Ombudsman complaints concerning the same matter, your complaint has been treated jointly with Mrs G.' and Mr T.' complaints.

On 10 December 2003, I forwarded the complaint to the Secretary General of the Council of the European Union. The Council sent its opinion on 30 March 2004 and I forwarded it to you with an invitation to make observations.

On 27 May 2004, I received your observations.

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

On 12 November 2001, the complainant received personalised note SN 3736/01 dated 11 September 2001 (hereafter, "the note dated 11 September 2001") with three annexes, signed by the Head of the Health Insurance Office. The note announced that, from 31/12/2001, the complainant's child would be covered by the Belgian social security system (*"mutuelles"*) and that the Joint Sickness Insurance Scheme (hereafter, "the JSIS") would provide cover only on a complementary basis.

On 14 December 2001, the complainant sent a joint letter, together with Mrs G. and Mr T., to the Deputy Director General for Personnel and Administration (hereafter, "the DGPA") commenting on the discriminatory character of the note dated 11 September 2001 and contesting its legal force. The letter also stated that its authors would not consider themselves bound by the note and requested an advisory opinion of the Legal Service of the Council concerning the note.

On 21 December 2001, the complainant received an answer from the DGPA, which advised her to contact the Head of the Health Insurance Office, or his deputy, in the event of a problem. The DGPA informed her that instructions had been given to the Health Insurance Office that the decision should be applied flexibly whenever the person concerned could not comply within the time limit but did not mention her request for a legal opinion.

In consequence, the complainant decided to submit the case to the Staff Committee, which took the initiative to organise a joint meeting between herself, Mrs G. and Mr T. on the one side and the DGPA on the other. At the request of the DGPA, transmitted to the complainant by the Staff Committee, she produced, together with Mrs G. and Mr T., a list of questions for discussion during the meeting. On 11 January 2002, the complainant sent, a list of questions to the Staff Committee, which forwarded it to the DGPA.

On 15 January 2002, the DGPA sent the complainant a letter, via the Staff Committee, refusing the idea of the meeting on the grounds that the questions proposed for the agenda did not concern the personal situation of any of the officials involved. The letter referred the complainant to the Head of the Health Insurance Office, or his deputy.

On 6 February 2002, the Staff Committee sent a letter to the DGPA expressing its concerns about the DGPA's refusal to meet the complainant as well as Mrs G. and Mr T..

The complainant continued to submit her applications for the reimbursement of her child's medical expenses in accordance with the rules previously in force.

The Health Insurance Office continued to reimburse the complainant as previously until 28 March 2003. On that date, the reimbursement for her child following the former rules was refused for the first time.

On 7 April 2003, the complainant sent an e-mail to the Health Insurance Office in which she disputed the note dated 11 September 2001 and summarised the measures taken by her, Mrs G. and Mr T. against it, citing among others her letter of 14 December 2001 to the DGPA. The complainant also announced her intention to use all remedies at her disposal against the new rules on medical insurance.

On 7 November 2003, she lodged a complaint with the European Ombudsman. In her introductory letter to the complaint, she referred to her letter of 14 December 2001 to the DGPA and explained that she had written this letter in order to set out the reasons for her disagreement, to underline the discriminatory character of the measure concerning new rules on reimbursement and to ask for the opinion of the Council's Legal Service. She also stated that when writing this letter she did not want to accept implicitly or explicitly the discriminatory measure and that she considered that the employer had tried to break the contract unilaterally and to introduce discriminatory measures.

She alleged that the note dated 11 September 2001 is in conflict with the Staff Regulations, discriminatory and not legally binding. She also alleged that the DGPA failed to reply exhaustively to her letter of 14 December 2001.

She claimed that she should have the right to the same treatment as other EU Staff members as regards the primary medical coverage for her child. She also claimed that she should receive full reimbursement of her child's medical expenses under the JSIS.

On the complaint form, she also indicated that the question concerning internal administrative requests and complaints related to a work relationship with the Community institutions and bodies (1) was not applicable in her case.

THE INQUIRY

The opinion of the Council

As regards the facts, the opinion can be summarised as follows.

On 12 November 2001, the complainant received a decision from the Health Insurance Office in the form of a personalised note dated 11 September 2001 stipulating that as her child was entitled to receive primary insurance cover from the Belgian *mutuelles* , he would be covered by the JSIS only on a complementary basis. Various documents were attached to this decision, including a certificate for her child, a copy of the statement of the Belgian National Sickness Invalidity Insurance Institute (INAMI) concerning the compulsory Belgian health insurance for a child of the parent who is covered by this insurance when the other parent is a European official, as well as a short explanation realting to these documents.

On 14 December 2001, the complainant (together with Mrs G. and Mr T.) wrote to the DGPA asking him to refer the matter to the Council Legal Service for an opinion and to extend the deadline for applying to the Belgian *mutuelle* .

On 21 December 2201, the DGPA replied to the complainant that instructions had been given to the Health Insurance Office that the directive in question, which came from the Commission Central Office, should be applied flexibly and invited the complainants to contact the Head of the Health Insurance Office or his deputy for any eventual problems.

On 11 January 2002, the complainant (together with Mrs. G. and Mr T.) wrote to the Chairman of the Staff Committee asking him to speak with the DGPA on this matter and a meeting with the DGPA was proposed.

On 15 January 2002, the DGPA replied to the Chairman of the Staff Committee that he did not see any useful purpose in organising the meeting because the questions proposed for the agenda did not affect the personal situation of any of the officials concerned. He also suggested a contact with the Staff Committee representative on the Management Committee for Sickness Insurance as regards the general question. The DGPA's reply was forwarded to the complainant.

Subsequently, the complainant did not contest the decision in question nor did she contest, within the statutory period, the decisions refusing reimbursement taken by the Health Insurance Office.

She received the first decision refusing reimbursement for her child on 28 March 2003.

The Council did not present any specific comments on the complainant's allegations and claims. The Council instead mentioned Art. 72 (1) of the Staff Regulations and Art. 6 of the Rules on Sickness Insurance for Officials of the European Communities, adopted by all the institutions through a joint agreement, recorded by the President of the Court of Justice of the European Communities on 28 August 1987. In accordance with those provisions, up to 80 % of the expenses incurred by the official for his children may be reimbursed only if the official has not received or cannot claim any reimbursement from any other sickness insurance scheme provided for by law or regulation. This means, according to the Council, that the amount reimbursed by the JSIS for expenses incurred by officials for their children is calculated after taking account of any reimbursement by any other sickness insurance scheme provided for by law or regulation, covering those children.

The Council also referred to the note dated 11 September 2001 as an administrative decision and stated that the complainant did not dispute this fact.

Finally, the Council questioned the admissibility of the complaint to the Ombudsman in the following terms:

The Statute of the European Ombudsman lays down the conditions under which a complaint may be referred to the Ombudsman. The present complaint relates to the work relationship between the complainant (a Council official) and the General Secretariat of the Council, which are governed by the Staff Regulations to which the Statute of the Ombudsman refers in Art. 2.8.

The decision to cover the complainants´ children by the JSIS (dated 11 September 2001) was communicated to the complainants on 12 November 2001 and it was possible for them to complain to the appointing authority by an internal administrative complaint under Art. 90 (2) of the Staff Regulations until 12 February 2002. Neither the complainants' approaches to the DGPA nor their approach to the Staff Committee are equivalent to an administrative complaint. The letter of 14 December 2001 has no formal characteristics of a complaint as regards its content and its purpose; it was not sent to the appointing authority via the hierarchical channels; it was not considered by the complainant as a complaint (on the Ombudsman's form, the complainant answered that the question about internal administrative requests and complaints was not applicable) and was not dealt with by the appointing authority as a complaint within the meaning of the Staff Regulations and according to the procedure laid down in Art. 16 of the Rules on Sickness Insurance for Officials of the European Communities.

The complainant's observations

The Ombudsman forwarded the opinion of the Council to the complainant. The Ombudsman received observations from the complainant which were expressed as containing the joint views of the complainant as well as those of Mrs G. and Mr T. and signed by all three complainants. Their observations can be summarised as follows.

Firstly, they rejected the Council's affirmation that the note dated 11 September 2001 had the character of an administrative decision and they took the view that it was simple information.

Secondly, they stated that they did not consider the letter sent by them to the DGPA on 14 December 2001 as a complaint. They took the view that by sending their letter of 14 December 2001, they wanted to receive more information in order to be able to submit a complaint later. In addition, they pointed out that they had never received such information and that it was impossible for them to submit a complaint in due form.

The complainants also noted that the Council did not refer to their allegations concerning the discriminatory character of the alleged rules on the insurance.

THE DECISION

1 The admissibility of the complaint

1.1 In its opinion, the Council objected to the admissibility of the complaint. The Council took the view that the complainant's letter of 14 December 2001 was not a complaint in terms of Art. 90(2) of the Staff Regulations because it was deprived of the formal characteristics of a complaint, was not sent to the appointing authority via the hierarchical channels, was not considered by the complainant as a complaint, was not dealt with by the appointing authority as a complaint within the meaning of the Staff Regulations and according to the procedure laid down in Article 16 of the Rules on Sickness Insurance for Officials of the European

Communities, and, in summary, did not take the form of a complaint as regards its content and its purpose.

In view of the above, the Council argued that the complainant's complaint to the European Ombudsman did not comply with the conditions specified in Art. 2. 8 of the European Ombudsman's Statute and should not have been considered as admissible by the European Ombudsman.

1.2 In her observations, the complainant considered that her letter of 14 December 2001 was not a complaint but a request for information.

THE OMBUDSMAN'S ASSESSMENT OF THE ADMISSIBILITY OF THE COMPLAINT *(a) The situation before the complainant's observations:*

1.3 In order to decide on the admissibility of the complaint, the Ombudsman took into consideration three elements: (i) the complainant's letter of 14 December 2001; (ii) the complainant's post 14 December 2001 behaviour in relation to the note dated 11 September 2001; (iii) the answer of the complainant to the question of the complaint form.

Firstly, the Ombudsman considered that, by the complainant's letter of 14 December 2001 and her subsequent behaviour described in her complaint, she appeared to consider the note dated 11 September 2001 as adversely affecting her and to contest it. She also seemed to have in mind the achievement of a friendly solution with the appointing authority as regards the insurance reimbursement. In this context, the Ombudsman recalled the established case law according to which a letter from an official which does not expressly request the withdrawal of the decision in question but is clearly intended to achieve an amicable settlement of his or her complaint or a letter which clearly expresses the applicant's will to challenge the decision which adversely affects him constitutes a complaint (2) .

Secondly, as regards the complainant's indication on the European Ombudsman's complaint form that the question about internal administrative requests and complaints that concern a work relationship with the Community institutions and bodies was not applicable, the Ombudsman noted that the complainant's answer was neither negative nor positive.

In this situation of *"non liquet"* and after having analysed the complainant's original complaint, the Ombudsman gave the complainant the benefit of the doubt that her letter of 14 December 2001 was an Art.90(2) appeal and that she had indeed made previous administrative approaches.

The Ombudsman therefore decided that the complaint was admissible in terms of Art.2.8 of the Ombudsman's Statute.

(b) The situation after the complainant's observations:

1.4 After the complainant had stated in her observations that her letter of 14 December 2001 was not a complaint but merely a request for information, the Ombudsman decided to re-evaluate the admissibility of the complaint and to re-consider his original decision on this issue.

1.5 The Ombudsman recalls that, following Art.2.8 of the Statute, no complaint may be made to the Ombudsman that concerns a work relationship between the Community institutions and bodies and their officials and other servants unless all possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90 (1) and (2) of the Staff Regulations, have been exhausted by the person concerned (…).

1.6 Given that the complainant manifestly stated in her observations that her letter of 14 December 2001 was not a complaint in nature and that it was merely a request for information, the Ombudsman excludes the benefit of the doubt given to the complainant's original statements and considers that the complainant did not exhaust the procedures referred to in Article 90(2) of the Staff Regulations.

(c) The status of the note dated 11 September 2001

1.7 The Ombudsman notes the contradictory statements of the Council and the complainant as concerns the status of the note dated 11 September 2001 (administrative decision or not).

However, the Ombudsman will not deal with this dispute given that its result would not determine the admissibility of the complaint in the light of the complainant's observations.

On the assumption that the note dated 11 September 2001 was a decision, the complaint is not admissible because the complainant, by her own admission, has not used Article 90(2) of the Staff Regulations; on the contrary assumption that the note dated 11 September 2001 was not a decision, the complaint is not admissible because the complainant has not used either Article 90(1) of the Staff Regulations to request a decision or Article 90(2) of the Staff Regulations subsequently to contest that decision.

2 Conclusion

In the light of the new information provided by the complainant in her observations, the Ombudsman considers that the complaint was dropped by the complainant. The Ombudsman therefore closes the case and will not continue his inquiries into the complainant's allegations and claims.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) "If the complaint concerns work relationships with the Community institutions and bodies: have you used all the possibilities for internal administrative requests and complaints, in particular the procedures referred to in Article 90(1) and (2) in the Staff regulations? If so, have the time limits for replies by the Institutions already expired?"

(2) See case T-14/91, *Weyrich v. Commission* , (1991) ECR-II-235, paragraph 39.