European Ombudsman

Decision of the European Ombudsman on complaint 2333/2003/GG against the European Commission

Decision
Case 2333/2003/GG - **Opened on** 16/12/2003 - **Decision on** 19/05/2004

In November 2001, a German doctor requested the European Commission to open infringement proceedings against Germany. He argued that Germany was infringing a Council Directive on the organisation of working time in so far as the activity of doctors in hospitals was concerned. The Court of Justice had held that time spent on call by doctors in primary health care teams must be regarded as working time. However, in Germany the interpretation prevailed that on-call service of doctors was not covered by the Directive's concept of "working time".

In his complaint to the Ombudsman, lodged in December 2003, the complainant submitted that so far he had only received acknowledgements of receipt and notices that further inquiries were being made, but no substantial answer. He alleged that the Commission had failed to deal with his complaint within a reasonable period of time.

The Commission argued that the delays in treating the complaint were due to the technical and legal complexity of the matter. It had registered the complainant's letter as a formal complaint in April 2002. In February 2003, it had written to the German authorities, who had replied in March 2003. Also in March 2003, the Commission had decided to commission a study concerning the effects of the judgment of the Court of Justice. It pointed out that it wished to await the outcome of this study before deciding on how to proceed. It explained that the Court's interpretation went against the interpretation put forward by the Commission and the Member States. Furthermore, a new German law to bring national legislation in line with the Directive as interpreted by the Court had entered into force in January 2004. The compatibility of this law with Community law was in the process of being examined. When this examination was finalised, the Commission would inform the complainant about the result of his complaint.

The Ombudsman pointed to a Commission Communication on relations with the complainant in respect of infringements of Community law, which set the general rule that the Commission would strive to arrive at a decision within not more than one year. Although this Communication was made after the complainant had lodged his complaint, the Ombudsman considered that it provided a useful yardstick.

The Ombudsman was not convinced that the delay was justified by the technical and legal complexity of the matter. The Commission itself had pointed out that the Court's judgment went

against its interpretation of the Directive. It thus appeared to have accepted that the legal position was already clarified. In any event, the purported legal and technical complexity of the matter did not explain why nearly 15 months lapsed before the Commission took any steps to clarify the matter. The Ombudsman concluded that the Commission had failed to deal with the complainant's infringement complaint within a reasonable period of time. He made a critical remark.

Strasbourg, 19 May 2004
Dear Mr X.,

On 6 December 2003, you made a complaint against the European Commission concerning a complaint against Germany which you had lodged with the Commission in 2001 and which the Commission had registered under reference 2002/4298 SG(2001)A/12659.

On 16 December 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 23 March 2004. I forwarded it to you on 29 March 2004 with an invitation to make observations, which you sent on 17 April 2004.

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

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into your complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission.

THE COMPLAINT

In November 2001, the complainant, a German doctor, requested the European Commission to open infringement proceedings against Germany. The complainant argued that Germany was infringing Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (1) in so far as the activity of doctors in hospitals was concerned. In the complainant’s view, this resulted in a considerable risk for both staff and patients.

The Commission registered the complaint under reference 2002/4298 SG(2001)A/12659.

In his complaint to the Ombudsman, the complainant submitted that so far he had only received acknowledgements of receipt with regard to his complaint and to further inquiries, but no answer as to the substance of the complaint. The complainant thus alleged that the Commission had failed to deal with his complaint within a resonable period of time.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

On 6 November 2001, the complainant had submitted his complaint to the Commission's representation in Munich, which had forwarded this complaint to the Commission's Secretariat-General on 15 November 2001. Directorate-General (DG) Employment and Social Affairs had sent a holding letter to the complainant on 4 December 2001. On 18 January 2002, DG Employment and Social Affairs had requested the Secretariat-General to register the complainant's letter as a complaint.

By letter dated 26 April 2002, the Commission's Secretariat-General informed the complainant that his letter had been registered as a formal complaint under reference 2002/4298 SG(2001)A/12659.

On 3 February 2003, DG Employment and Social Affairs wrote to the German authorities in order to ask for information regarding the implementation of Directive 93/104, and in particular Article 6 thereof (which concerns the maximum weekly working time), in so far as German hospitals were concerned. In this letter, the Commission expressed the view that a judgement given by the Court of Justice on a request for a preliminary ruling clarified the interpretation of the relevant rule of Community law and that this interpretation was therefore to be applied to comparable or analogous situations. The German authorities had replied on 24 March 2003.

On 11 March 2003, DG Employment and Social Affairs informed the complainant that it had decided to commission an external expert to prepare a study concerning the effects of the judgement of the Court of Justice in the *Simap* case (2) in the Member States, in particular as regards the compatibility of national rules and the consequences of this judgement in the health sector. The Commission pointed out that given the complexity of the matter, it wished to await the outcome of this study before deciding how to proceed. The complainant was also informed that the Commission had asked the German authorities for information.

In this context and on the basis of the information that was available, it appeared possible that the German legislation which was in the process of being revised could become compatible with the Directive as interpreted by the Court in the *Simap* case and in its judgement in the *Jaeger* case (3) .

In its judgement in the *Simap* case, the Court had held "that time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if they are required to be present at the health centre" (4) . This interpretation went against the interpretation that had been put forward by the Commission and the Member States at the relevant time. According to this interpretation, the on-call service of doctors was not covered by the Directive's concept of "working time".

Given the complexity of the issue and the likely impact of this case-law in financial, organisational and human terms, the Commission embarked on a thorough examination of the consequences in the Member States.

In its judgement in the *Jaeger* case of 9 September 2003, the Court confirmed and clarified its case-law.

One day after this judgement, the German government submitted a draft law intended to bring German legislation in line with the Directive as interpreted by the Court. On 24 December 2003, Germany adopted the law on the reform of the labour market, which in particular modifies the law on working time. The new law entered into force on 1 January 2004.

The Commission had also announced a communication on working time and on the effect of the Court's judgements in the *Simap* and *Jaeger* cases. This communication was adopted on 30 December 2003 (5) .

The delays in treating the complaint were due to the technical and legal complexity of this matter. However, it should be noted that Germany had adopted a new law in order to bring German legislation in line with the Directive as interpreted by the Court. The compatibility of this law, which had been communicated to the Commission on 6 February 2004, with Community law was in the process of being examined. Once this examination was finalised, the Commission's services would write to the complainant in order to inform him about the result of his complaint.

The complainant's observations

In his observations, the complainant maintained his complaint and made the following further comments:

The Commission had sent an acknowledgement of receipt concerning his complaint on 6 November 2001. On 3 February 2003, the Commission had asked the German authorities for information. It followed that the Commission had let 15 months pass before it started dealing with the objections at all.

The Commission's reference to the "complexity" of the matter was surprising. Already in its judgement in the *Simap* case in October 2000, the Court had clearly and unambiguously held that time spent on call clearly corresponded to working time. The matter was in reality not at all "complex". The Commission could easily have obtained insights into the real situation by consulting some of the persons concerned by the duty to provide on-call service.

Even putting theoretical considerations regarding on-call service aside, the protection of workers against health risks was undermined by the prevailing working conditions as such. Although more than two and a half years had passed since his complaint had been lodged in November 2001, the Commission had not insisted that Community rules on the protection of workers should be respected. Breaches of these rules by Member States had been and were still being tolerated. The new rules adopted by Germany still failed to comply with the spirit of the

Directive. In particular, Articles 3 and 15 of the Directive on daily rest were disregarded by the German government, resulting in risks for both staff and patients.

THE DECISION

1 Alleged failure to deal with infringement complaint within an appropriate period of time

1.1 On 6 November 2001, the complainant, a German doctor, requested the European Commission to open infringement proceedings against Germany. The complainant argued that Germany was infringing Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (6) in so far as the activity of doctors in hospitals was concerned. According to the complainant, at the date of his complaint to the Ombudsman, he had only received acknowledgements of receipt with regard to his complaint and to further inquiries, but no answer as to the substance of the complaint. The complainant thus alleges that the Commission failed to deal with his complaint within a reasonable period of time.

1.2 In its opinion, the Commission points out that it informed the complainant on 26 April 2002 that his letter had been registered as a formal complaint under reference 2002/4298 SG(2001)A/12659 and that it asked the German authorities for information regarding the implementation of Directive 93/104 in so far as German hospitals were concerned on 3 February 2003. The Commission further submits that in the light of the likely impact of the Court's judgement in the *Simap* case (7) , it decided to embark on a thorough examination of the consequences in the Member States. On 11 March 2003, it informed the complainant that, given the complexity of the matter, it wished to await the outcome of this study before deciding how to proceed. The Commission notes that in its judgement of 9 September 2003 in the *Jaeger* case (8) , the Court confirmed and clarified its case-law and that Germany subsequently amended her national law in the field. According to the Commission, the compatibility with Community law of this amended German law, which had been communicated to the Commission on 6 February 2004, was in the process of being examined, and the complainant would be informed about the result of his complaint once this examination was finalised. The Commission concludes that the delays in treating the complaint were due to the technical and legal complexity of this matter.

1.3 It is good administrative practice for the Commission to deal with complaints alleging infringements of Community law by Member States within a reasonable period of time. In its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (9) , the Commission confirmed that, as a general rule, its services would "investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General". Although this Communication was made after the complainant had lodged his complaint with the Commission, the Ombudsman considers that it provides a useful yardstick when deciding what a reasonable period of time would be.

1.4 In the present case, the Ombudsman notes that the Commission addressed a request for information to the German authorities on 3 February 2003. As the complainant correctly points

out, the Commission had thus let nearly 15 months pass before it started dealing with the objections that he had raised. The Ombudsman is not convinced that this delay was justified by the technical and legal complexity of this matter, as the Commission submits. In its opinion, the Commission itself accepts that the judgement of the Court of Justice in the *Simap* case went against the interpretation of the Directive previously held by the Commission and the Member States according to which the on-call service of doctors was not covered by the Directive's concept of "working time". The Commission would thus appear to accept that the legal position was already clarified by the *Simap* case in 2000, and that the judgement in the *Jaeger* case only confirmed this case-law. It is therefore difficult to see what the legal complexity to which the Commission refers could have consisted of after that judgement. It should be noted that the Commission itself, in its letter addressed to the German authorities on 3 February 2003, stressed that a judgement given by the Court of Justice on a request for a preliminary ruling clarified the interpretation of the relevant rule of Community law and that this interpretation was therefore to be applied to comparable or analogous situations. In this context, the Commission explicitly referred to the Court's judgement in the *Simap* case. It should also be noted that in its submissions to the Court in the *Jaeger* case, the Commission appears to have maintained that time spent on call is, in general, working time, since doctors are required to stay at the hospital, at the disposal of the employer, in order to practise their profession (10) . In any event, the purported legal and technical complexity of the matter does not explain why nearly 15 months lapsed before the Commission took any steps to clarify this matter.

2 Conclusion

2.1 In these circumstances, the Ombudsman considers that the Commission failed to deal with the complainant's infringement complaint within a reasonable period of time. This constitutes an instance of maladministration.

2.2 Article 3 (5) of the Statute of the Ombudsman (11) directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complaint. In cases such as the present one where there have been delays in an administrative procedure, such a friendly solution could be brought about by a proposal made by the Ombudsman according to which the administration should finalise its procedure within a short additional period of time, provided that this proposal is accepted by the administration and the complainant.

2.3 It should however be noted that Germany has in the meantime adopted a new law in order to bring the German legislation in line with the Directive as interpreted by the Court and that this new law was notified to the Commission on 6 February 2004. The Commission will need to examine the compatibility of this new law with Community law in order to be able to deal with the complainant's infringement complaint. This examination is currently being carried out by the Commission. Given that the Commission appears to accept that the judgement in the *Jaeger* case has clarified the legal issues, the Ombudsman has no reason to assume that the Commission will incur further delays in dealing with the complainant's infringement complaint. The Ombudsman therefore considers that the best way to proceed in the present case is to make a finding of maladministration as regards the delay that has occurred in the past. The complainant of course remains free to submit a new complaint to the Ombudsman if the Commission should nevertheless incur further delays in dealing with his infringement complaint.

2.4 On the basis of the Ombudsman's inquiries into this complaint, it is thus necessary to make the following critical remark:

It is good administrative practice for the Commission to deal with complaints alleging infringements of Community law by Member States within a reasonable period of time. In the present case, nearly 15 months passed before the Commission started dealing with the objections raised by the complaint by sending a request for information to the Member State concerned. In these circumstances, the Ombudsman considers that the Commission failed to deal with the complainant's infringement complaint within a reasonable period of time. This constitutes an instance of maladministration.

2.5 In the light of the above considerations (see point 2.3), the Ombudsman closes the case. The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1993 no. L 307, p. 18.

(2) Case C-303/98 *Simap* [2000] ECR I-7963.

(3) Judgement of 9 September 2003 in Case C-151/02 *Landeshauptstadt Kiel v Jaeger* .

(4) Loc. cit., paragraph 52.

(5) Document COM(2003) 843 final.

(6) OJ 1993 no. L 307, p. 18.

(7) Case C-303/98 *Simap* [2000] ECR I-7963.

(8) Judgement of 9 September 2003 in Case C-151/02 *Landeshauptstadt Kiel v Jaeger* .

(9) OJ 2002 no. C 244, p. 5.

(10) See paragraph 18 of the opinion of Advocate-General Colomer. It should be noted that the oral hearing in the *Jaeger* case was held on 25 February 2003, that is to say before the Commission informed the complainant, on 11 March 2003, that it wished to await the outcome of a study before deciding how to proceed.

(11) 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, p. 15.