

## **Decision of the European Ombudsman closing his inquiry into complaint 2714/2008/MF against the European Commission**

Decision

**Case 2714/2008/MF - Opened on 24/11/2008 - Decision on 11/11/2009**

### **THE BACKGROUND TO THE COMPLAINT**

1. The complainant is a retired official of the European Commission. He began working for the Commission in January 1974.
2. From 1 September 2002 to 1 August 2005, the complainant worked as a Senior Adviser for an international organisation. During that time, he was on 'leave on personal grounds'. Upon his return to the Commission in 2005, the complainant occupied a position of desk officer in the Commission.
3. On 12 January 2008, the complainant reached the age of 65. This meant that, on in accordance with Article 52(a) of the Staff Regulations [1], he would be automatically retired on 31 January 2008.
4. On the basis of Article 52, second paragraph of the Staff Regulations, the complainant submitted a request to continue working for two more years, that is, until 31 January 2010.
5. By note of 25 January 2008, signed by the Director-General of DG ADMIN, the complainant was informed that his request had been rejected.
6. By e-mail of 15 April 2008, the complainant lodged a complaint under Article 90(2) of the Staff Regulations. He referred, in this respect, to the reasons why he worked for the international organisation. In summary, he took the view that, despite having formally performed this work during his leave on personal grounds, he was in fact working in the interests of the Commission. The Commission proposed this post to him, which he accepted on the understanding that the international organisation would provide expatriate staff with child education and lodging allowances that would have brought the remuneration he received from the international organisation reasonably close to the level he had at the Commission. However, he did not receive the allowances for accommodation and education expenses which had been promised



to him. As a result, he incurred considerable financial losses amounting to EUR 132 900. The complainant stated that the permission to continue working after the normal retirement age would compensate for the losses he incurred when working for the international organisation. If his request were to be refused, the complainant felt that the Commission should pay compensate him financially.

7. The Appointing Authority rejected the Article 90(2) complaint because, by the time the complainant was almost at the normal age of retirement, his colleague had already taken on his special field of expertise. Therefore, the Appointing Authority took the view that the condition of the "*interest for the service*", as provided for in Article 52 of the Staff Regulations, was not met. On 13 October 2008, the complainant turned to the European Ombudsman against this decision.

8. In the meantime, pursuant to Article 90(1) of the Staff Regulations, the complainant's request for compensation was registered and dealt with separately as a formal request. This request was finally rejected. So was the complainant's subsequent complaint under Article 90(2) of the Staff Regulations.

## THE SUBJECT MATTER OF THE INQUIRY

9. The complainant alleged that the Commission unfairly rejected his request to: (i) receive compensation for the financial losses he suffered whilst working for the international organisation or (ii) alternatively, to allow him to continue working until the age of 67.

10. The complainant claimed that he should (i) be authorised to work beyond the age of 65 in order to be compensated for the financial losses he suffered whilst working for the international organisation or (ii) receive adequate compensation for the financial losses he suffered whilst working for the international organisation.

## THE INQUIRY

11. On 24 November 2008, the Ombudsman opened an inquiry regarding the complainant's allegation and claims.

12. The Commission sent its opinion on 11 February 2009. The Ombudsman then forwarded it to the complainant with an invitation to make observations, which he sent on 30 April 2009.

13. By letter of 12 May 2009, the complainant informed the Ombudsman's services that he had lodged an appeal with the European Union Civil Service Tribunal against the Commission. The appeal concerned the Appointing Authority's decision of 2 September 2008 rejecting his claim for compensation.



## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### A. Alleged unfair rejection of the complainant's request for compensation and for the extension of service beyond the age of 65 and related claim

#### *Arguments presented to the Ombudsman*

14. The complainant alleged that the Commission unfairly rejected his request to: (i) receive compensation for the financial losses he suffered whilst working for the international organisation or (ii) alternatively, to allow him to continue working until the age of 67.

15. He claimed that he should (i) be authorised to work beyond the age of 65 in order to be compensated for the financial losses he suffered whilst working for the international organisation; or (ii) receive adequate compensation for the financial losses he suffered whilst working for the international organisation.

16. In support of his allegation and claims, the complainant stated that he joined INTERNATIONAL ORGANISATION " *upon the Commission's request* ". However, he needed to take leave on personal grounds in order to do so. The Commission suggested this solution to him because it needed to have a European representative in the international organisation, but could not pay the complainant from its budget. While he was working for the international organisation, he had to be covered by the international organisation's budget. The complainant accepted the post on the understanding that the international organisation would provide expatriate staff with child education and accommodation allowances. Payment of such allowances would have brought the remuneration he received from the international organisation reasonably close to the level of remuneration he had at the Commission. However, the complainant did not receive certain allowances for the reimbursement of accommodation and education expenses which had been promised to him. He, therefore, incurred considerable financial losses amounting to EUR 132 900. The complainant stated that the permission to continue working after the normal retirement age would compensate for the losses he incurred when working for the international organisation.

17. The Commission stated that, in its reply to the complainant's Article 90(2) complaint [2] , the Appointing Authority rejected the complaint on the grounds that there was no legal basis for compensation. According to Article 40(1) of the Staff Regulations [3] , leave on personal grounds may be granted upon the request of the official concerned and is unpaid. The complainant was, therefore, not entitled to receive any financial resources from the Commission.

18. The Commission also stated that, on the basis of the second indent of Article 52 of the Staff Regulations, it is clear that the normal retirement age is 65. However, officials may be allowed to work beyond this age limit (i) in exceptional cases and (ii) if the Appointing Authority considers that the interest of the service justifies a departure from the normal retirement age.



19. However, the decision regarding the extension of an official's employment beyond the age of 65 is *not* based on that official's competence, experience and devotion to duty, but on an examination of whether that extension is necessary in the interest of the service.

20. In the case-by-case analysis required to establish whether the criteria indicated in the second indent of Article 52 of the Staff Regulations are met, the Appointing Authority should take the following criteria into consideration:

- whether the institution is encountering considerable problems in finding a successor for the official in question;
- whether the activities being carried out by the official will be obsolete in the near future, which would render the appointment of a successor in conflict with the interest of the service; or
- whether the official will, within a reasonable amount of time, finish a long- term project which he/she has been working on.

21. By the time the complainant's normal retirement age drew near, a colleague had already taken on his special field of expertise.

22. Given the above reasons, the Commission considered that the Appointing Authority rightly refused to accept the complainant's request to continue working after the age of 65.

#### *The Ombudsman's assessment*

23. At the very outset, the Ombudsman points out that, in the complainant's view, the extension of his work beyond the statutory age-limit would constitute an alternative form of financial compensation for the losses he incurred because he accepted to work for the international organisation and take leave on personal grounds. The inquiry was opened exactly on the above issue.

24. However, in the course of the inquiry, the complainant informed the Ombudsman that, on 26 May 2009, he lodged an appeal with the European Civil Service Tribunal. The complainant's pleas in law and main arguments of the application are written as follows:

*" Annulment of the claim for compensation for the loss suffered by the applicant during his leave on personal grounds taken to perform the duties [at the international organisation] , loss resulting from the failure to reimburse accommodation and education expenses. The applicant claims that the Tribunal should annul the decision of the appointing authority of 2 September 2008 rejecting the applicant's claim for compensation; order the Commission to pay the applicant EUR 132 900 by way of reimbursement for accommodation and education expenses which he incurred in the course of his duties [at the international organisation] [4] .*

25. The Ombudsman recalls in this respect that Article 195 of the Treaty establishing the European Community empowers the Ombudsman to receive complaints

*"... concerning instances of maladministration in the activities of the Community institutions or*



*bodies ... except where the alleged facts are or have been the subject of legal proceedings . "*  
(emphasis added)

Moreover, Article 2(7) of the European Ombudsman's Statute provides that:

*"... when the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any inquiries he has carried out up to that point shall be filed without further action. "*

26. In light of the above provisions, and given that the complainant has informed the Ombudsman of his case before the European Union Civil Service Tribunal, which concerns the same facts as those on which his allegations and claims are based, the Ombudsman terminates his consideration of the present complaint and files the outcome of his inquiries carried out so far without any further action.

## C. Conclusions

On the basis of Article 2(7) of the Ombudsman's Statute and Article 195 of the Treaty establishing the European Community, the Ombudsman terminates his consideration of the complaint and files the case without any further action.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 11 November 2009

[1] Article 52 of the Staff Regulations states that:

*" Without prejudice to the provisions of Article 50, an official shall be retired:*

*(a) either automatically on the last day of the month in which he reaches the age of 65, or*

*(b) at his own request on the last day of the month in respect of which the request was submitted where he is at least 63 years of age or where he is between 55 and 63 years of age and satisfies the requirements for immediate payment of a pension in accordance with Article 9 of Annex VIII. The second sentence of the second paragraph of Article 48 shall apply by analogy.*

*However, on an exceptional basis, an official may at his own request and only in the case where the Appointing Authority considers it justified in the interest of the service , carry on working until the age of 67 in which case he shall be retired automatically on the last day of the month in*



*which he reaches that age.* " (emphasis added)

[2] On 11 February 2009, the complainant sent to the Ombudsman a copy of the Commission's reply to his Article 90(2) complaint.

[3] Article 40(1) of the Staff Regulations reads as follows: "*An established official may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds.* "

[4] OJ2009 C 180, pp. 64-65.