

Draft recommendation to the European Parliament in complaint 902/2007/(MHZ)RT

Recommendation

**Case 902/2007/(MHZ)RT - Opened on 02/05/2007 - Recommendation on 21/01/2008 -
Decision on 11/08/2008**

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT

According to the complainant, a European Parliament official, the facts were, in summary, as follows:

Just 15 days before the new Staff Regulations entered into force, the complainant's category was changed from that of temporary agent at grade C to an official at grade D.

On 14 June 2004, that is, following the first payment made to the complainant in his new category and grade, he asked the Administration by e-mail whether the new amount of his salary was correct.

In her reply of the same date, an official of Parliament's Pay and Allowances Unit (2) stated that the amount of EUR 3 108.01, which was paid by Parliament to the complainant's bank account, was indeed his monthly net salary (3) for June, and corresponded to his new category as an official. Parliament's official added that the change in the complainant's category, as from 16 April 2004, from temporary agent to official was reflected in the payment of his salary for May 2004. The official's e-mail sent to the complainant reads as follows: "*The amount of EUR 3108.01 that you have received to your account is indeed your monthly net salary for June (as an official). The change of the category temporary agent/official starting on 16 April was made in the payment for May.*" (4)

In light of that reply, and given that the complainant's duties in his new category were the same as his duties in his former category, and also taking into account the "*Dispositions générales d'exécution relatives au classement en échelon*", issued by Parliament's Secretary-General on 18 May 2004, the complainant formed the view that, as far as salary was concerned, the change in his category was favourable to him under the new Staff Regulations.

Two years later, Parliament's Administration noticed that the complainant's salary, as regards



his secretarial allowance and his net salary, had been erroneously calculated and that he had been overpaid throughout the intervening period.

On 26 June 2006, the Administration issued a decision concerning the complainant, whereby, on the basis of Article 85 of the Staff Regulations, he was asked to repay the monies unduly paid to him as a secretarial allowance. The sum to be reimbursed amounted to EUR 3 052.15. The Administration acknowledged that the undue payment of the secretarial allowance to the complainant was the result of an administrative error but went on to state that the payment in question was so evident in the complainant's monthly salary statements (5) , that he could not have been unaware of it. Therefore the Administration decided that the above undue payment would be recovered from the complainant's monthly salary, as from April 2006, by means of seven monthly instalments of EUR 415 each, as well as a final instalment of EUR 147.15.

As regards the undue payment of the complainant's net salary, the Administration, in its decision of 26 June 2006, explained that that error was due to the change in the complainant's category which, for technical reasons, was not reflected in the new accounting software known as "PAIE". Therefore, the Administration took the view that the complainant could not reasonably have become aware of the administrative error involved and that, therefore, Article 85 of the Staff Regulations would not be applied to those payments unduly made to the complainant.

The complainant did not agree with that decision and, on 4 September 2006, he made an appeal under Article 90(2) of the Staff Regulations. The complainant underlined that (i) the error was made by the Administration; (ii) he himself, in his e-mail of 14 June 2004, drew the Administration's attention to the amount of his salary and pointed out that the total amount of his salary as an official appeared was the same as the amount of his salary as a temporary agent; (iii) in reply, the Administration assured him that the calculations were correct as regards his monthly net salary; and (iv) given that the components of the salary as a temporary agent and as an official were the same, the complainant could not have become aware that the calculations of some components of his salary were wrong and others were not. The complainant stated that he had acted in good faith and pointed out that the recovery, as announced in the Administration's decision of 26 June 2006, would have harmful effects on his family's financial situation, given that his adult handicapped son was permanently dependent on parental support. The complainant asked Parliament to annul the decision of 26 June 2006.

On 14 February 2006, Parliament's Secretary-General replied to the complainant's appeal. He maintained the Administration's decision of 26 April 2006. He stressed that, according to the established case-law of the Community Courts, the application of Article 85 of the Staff Regulations presupposed that the administration had committed an error in its payment (Case T-122/96 *Chabert v Commission* (6)). In the same judgment, the Court stated that it was not necessary to establish whether the error was evident for the administration but rather whether the error was evident for the official concerned. The Secretary-General found that, for technical reasons, the complainant was not able to establish the error committed in the calculation of his basic salary. As regards the secretarial allowance, the complainant was classified as a category D official on 16 April 2004, that is, before the new Staff Regulations entered into force and,



given his seniority in the institution, he knew that, under the old Staff Regulations (Article 4 bis Annex VII), only category C officials could receive the secretarial allowance. Therefore, the complainant could not conclude that, under the new Staff Regulations, the secretarial allowance should also have been paid to him as a category D official. As regards the complainant's e-mail of 14 June 2004, the Secretary-General stated that "*on the basis of the available evidence it cannot be concluded that the complainant expressed serious and precise doubts as regards the secretarial allowance in particular*" (7). With respect to the secretarial allowance, the Secretary-General pointed out that "*the complainant contacted the Administration in this respect only once*" (8). Therefore the conditions for the application of Article 85 were met. In addition, the Secretary-General took the view that the recovery of the amount due in seven monthly rates corresponded to the principles of good administration and of due care. Finally, the Secretary-General informed the complainant of the means of redress at his disposal, namely, the Community Courts and the Ombudsman.

On 28 March 2007, the complainant lodged a complaint with the Ombudsman.

The complainant alleged that Parliament wrongly applied Article 85 of the Staff Regulations in his case and did not take his good faith into account.

The complainant alleges that, given his family situation, it would be unfair for Parliament to recover the undue payment.

The complainant claimed that Parliament should cancel its decision to recover the amount of EUR 3 052.15.

THE INQUIRY

Parliament's opinion

In response to the Ombudsman's request, made in his letter opening his inquiry, Parliament attached to its opinion a copy of the complainant's salary statements for April, May, June 2004 and a copy of the "*Dispositions générales d'exécution relatives au classement en échelon*", which were issued by Parliament's Secretary-General on 18 May 2004.

The opinion can be summarised as follows.

The complainant held a post as a category C temporary agent between October 2001 and 15 April 2004.

On 16 April 2004, he was appointed as a probationary official in category D, grade D3/3 under the old Staff Regulations.

Two errors were made in calculating his remuneration at that time. First, his entitlement to the secretarial allowance was not revoked. Second, a computer error was made in the complainant's file following the introduction of the new software "PAIE". As a result of these errors, the complainant continued to receive the same basic salary as well as the secretarial



allowance, despite the fact that his category had changed.

Once the situation had come to light, the appointing authority, acting under Article 85 of the Staff Regulations, decided not to recover the amount of EUR 4 746.58 overpaid for his basic salary, which was the result of computer error, because the complainant could not have been aware of. It did, however, decide to recover the secretarial allowance, that is, the sum of EUR 3 052.15.

Parliament took the view that it was not disputed that the administration made two errors in calculating the complainant's salary, when he ceased to be a temporary agent at grade C5/4 and became an official at grade D3/36.

Parliament recalled that, in order to apply Article 85 of the Staff Regulations, the administration must prove either that the official concerned was aware that there was no due reason for the payment, or that the overpayment was patently such that the official concerned could not have been unaware of it.

As regards the latter condition of Article 85 of the Staff Regulations, Parliament stressed that, according to the established case-law of the Community Court's, the case to be established was not whether the error was clear to the administration, but whether it was clear to the official concerned (9) . According to Parliament, account must be taken in each case of the ability of the official concerned to carry out the necessary checks.

Parliament took the view that, in the complainant's case, the error in calculating the basic salary that occurred as a result of a change in software could not have been noticed by the complainant.

However, as regards the undue payment of the secretarial allowance, Parliament noted that the complainant was appointed as a category D official before the entry into force of the new Staff Regulations. Parliament pointed out that, given his seniority in the institution, he knew that, under the old Staff Regulations (Article 4 bis Annex VII), only category C officials could receive the secretarial allowance. Therefore, the complainant could not conclude that the secretarial allowance should also have been paid to him as a category D official under the new Staff Regulations as well.

Parliament also stated that, although the complainant did consult a member of staff in the Pay and Allowance Unit, he did not clearly ask that person whether it was correct for him to receive the secretarial allowance.

Parliament pointed out that the administration's error as regards the fixed allowance was patently such that the complainant could not have been unaware of it.

Parliament also explained that the sum of EUR 3052.15 was recovered in eight monthly instalments, in accordance with the principles of good administration.



Parliament therefore concluded that the decision of 14 February 2007 was well founded.

The complainant's observations

The complainant, in summary, maintained his original complaint. He pointed out that he was aware of the fact that a category D official did not receive a secretarial allowance. He emphasised however that, after receiving a written confirmation from the administration that his payment was correct, he formed the view that he continued to receive the same salary without making a distinction between the various components of the payment. He took the view that he had no reason to doubt of the accuracy of the information received from the administration.

The complainant recalled that there was a general uncertainty among the staff as regards the new Staff Regulations. Therefore, he thought that the change of category was favourable to him under the new Staff Regulations.

The complainant emphasised his good faith. He took the view that he asked the administration about his payment and he received confirmation from it that his salary was correct.

In the complainant's view the administration's error could not be divided into two separate parts.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that Parliament had responded adequately to the complainant's allegation and related claim.

The proposal for a friendly solution

Article 3(5) of the Statute of the Ombudsman directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant.

The Ombudsman therefore made the following proposal for a friendly solution to Parliament:

Parliament could consider cancelling its decision to recover the amount of EUR 2 821.13 (10) which represents the secretarial allowance paid to the complainant from 14 June 2004 to 26 June 2006.

This proposal was based on the following considerations:

1. The Ombudsman first noted that the fact that the payment was unduly made was not contested in the present case.
2. Next, the Ombudsman pointed out that the change of the complainant's category from a category C temporary agent to a category D official took place on 16 April 2004. The Ombudsman also noted that, while category C temporary agents were entitled to receive a secretarial allowance, category D officials were not entitled to receive that allowance. After examining the complainant's salary statements for April, May, and June 2004, sent to him by



Parliament, the Ombudsman noted that the component "secretarial allowance" was clearly marked on these salary statements and marked separately from other components. It also appears that the secretarial allowance was a component of the net salary.

3. In addition, the Ombudsman noted that, in his observations, the complainant himself stated that he knew, at the time, that category D officials were not entitled to the secretarial allowance.

4. Therefore, the Ombudsman concluded that the complainant was certainly aware that the secretarial allowance was not duly paid to him when, on 14 June 2004, he approached the administration for an explanation as regards the amount of his salary.

5. The Ombudsman recalled that, according to the Article 85 of the Staff Regulations, any sum overpaid shall be recovered " *if (...) the fact of the overpayment was patently such that [the recipient] could not have been unaware of it* " (emphasis added), and concluded that the recovery of the secretarial allowance paid to the complainant up to 14 June 2004 could have appeared to be justified under Article 85 of the Staff Regulations.

6. However, the Ombudsman took the view that, on 14 June 2004, when the complainant received the reply to his above e-mail of the same day, his legal situation changed substantially because of the reply he received from Parliament's Pay and Allowances Unit, which deals specifically with the calculation of salaries (11) .

7. In this respect, the Ombudsman noted that Parliament, in its e-mail dated 14 June 2004, categorically stated that " *the change of the complainant's category from C to D was reflected in his payment for May* " and pointed out that, according to Parliament itself, this change was the reason for the non-payment of the secretarial allowance. For that reason, the Ombudsman did not see why the complainant should have, additionally, asked the Administration about the secretarial allowance in particular.

8. Therefore, the Ombudsman considered that, given the fact that, on 14 June 2004, Parliament informed the complainant that his change of category had been properly reflected in the payment of his salary, the complainant could have legitimately considered that the secretarial allowance, which was connected to his change of category, was correctly paid to him.

9. In the above circumstances, the Ombudsman's provisional conclusion was that, by recovering the secretarial allowance paid to the complainant for the period from 14 June 2004 to 26 June 2006, Parliament wrongly applied Article 85 of the Staff Regulations and this wrongful application of Article 85 could constitute an instance of maladministration.

Parliament's reply

Parliament reiterated, in summary, the arguments put forward in its opinion to the Ombudsman. It stated, in addition, that, given that the conditions of Article 85 of Staff Regulations were met, Parliament was required to proceed to the recovery of the unduly payment. In this respect, it emphasised that the complainant himself recognised in his observations that he was aware of the fact that a category D official did not receive a secretarial allowance. Moreover, Parliament failed to see how, following his e-mail dated 14 June 2004, the complainant could have been



unaware that the secretarial allowance had been unduly paid.

Parliament also recalled that recovery under Article 85 of the Staff Regulations of any sum overpaid must be carried out within the framework of the Financial Regulation and of the Rules for the implementation of the Financial Regulation (12) . Parliament pointed out that, given the provision of the Article 71(3) of the Financial Regulation (13) , the institution has no margin of discretion regarding the recovery of an established amount receivable, since the waiver of such an amount is strictly limited to the cases foreseen by Article 73(2) of the Financial Regulation and Article 87 of the Rules for the implementation of the Financial Regulation.

Parliament also underlined that it acted with care in staggering the deductions over about eight months so as to lessen the inconvenience resulting from the mistake.

Finally, Parliament considered that it applied Article 85 of the Staff Regulations in line with the principle of sound administration and with the duty of care. Therefore, Parliament was not able to endorse the friendly solution proposed by the Ombudsman.

The complainant's observations

The complainant, in summary expressed his disappointment concerning Parliament's assertion that he could not consider that his salary was not overpaid " *only on the basis of the e-mail received from the administration.* " The complainant pointed out that the e-mail in question followed verbal assurances received by the complainant from the administration.

The Ombudsman's appraisal

On the basis of Parliament's opinion and the complainant's observations, the Ombudsman concluded that no friendly solution could be achieved.

THE DECISION

1. The alleged wrongful and unfair recovery of the secretarial allowance

1.1 The complainant is a European Parliament official. On 16 April 2004, he changed from a category C temporary agent to a category D official. On 14 June 2004, he asked the Administration by e-mail whether the new amount of his salary was correct. In her reply of the same date, an official of Parliament's Pay and Allowances Unit (14) stated that the amount of EUR 3 108.01, which was paid by Parliament to the complainant's bank account, was indeed his monthly net salary (15) for June, and corresponded to his new category as an official. Parliament's official added that the change in the complainant's category, as from 16 April 2004, from temporary agent to official was reflected in the payment of his salary for May 2004 (16) . On 26 June 2006, Parliament noticed that the complainant's salary, as regards his secretarial allowance and the net salary, was erroneously calculated and informed the complainant of its decision, taken on the basis of Article 85 of the Staff Regulations, to recover the amount of EUR 3 052.15 unduly paid to him in the form of a secretarial allowance. The Administration decided that the above undue payment would be recovered from the complainant's monthly salary, as from April 2006, by means of seven monthly instalments of EUR 415 each, as well as a final instalment of EUR 147.15.

The complainant turned to the European Ombudsman and alleged that Parliament wrongly



applied Article 85 of the Staff Regulations in his case and did not take into account his good faith. He also alleged that it would be unfair for Parliament to recover the undue payment given his family situation. The complainant claimed that Parliament should cancel its decision to recover the amount of EUR 3 052.15.

1.2 Parliament argues, in summary, that: (i) the complainant could not have been unaware of the wrongful calculation of that secretarial allowance, given his seniority in the institution; (ii) in his e-mail of 14 June 2004, the complainant did not clearly ask the Pay and Allowance Unit whether it was correct for him to receive the secretarial allowance.

1.3 On 11 October 2007, for the reasons explained in points 1 to 9 above, the Ombudsman arrived at the preliminary conclusion that, by recovering the secretarial allowance paid to the complainant for the period from 14 June 2004 to 26 June 2006, Parliament wrongly applied Article 85 of the Staff Regulations and that this wrongful application of Article 85 could constitute an instance of maladministration. Therefore, the Ombudsman made the following proposal of a friendly solution to Parliament: Parliament could consider cancelling its decision to recover the amount of EUR 2 821.13 (17) which represents the secretarial allowance paid to the complainant from 14 June 2004 to 26 June 2006.

1.4 In its reply to the above proposal, Parliament maintained that it acted according to the relevant legal provisions and that, following Parliament's e-mail of 14 June 2004, the complainant could have been unaware that the secretariat allowance had been unduly paid. Parliament also advanced that the institution has no margin of discretion regarding the recovery of an established amount receivable, since the waiver of such an amount is strictly limited to the cases foreseen by the Financial Regulation and the Rules for the implementation of the Financial Regulation.

1.5 At the outset, in the Ombudsman's view, it appears that Parliament interprets the complainant's behaviour as being indicative of bad faith. The Ombudsman cannot accept this interpretation of the facts. The Ombudsman is of the view that Parliament could validly question the complainant's good faith if he had not approached Parliament's administration to inform it of his doubts concerning the amount of his salary (and relatedly, of his secretarial allowance).

1.6 Moreover, the Ombudsman points out that, according to the Community case-law, once the officials or servants inform the administration of their doubts concerning the payments made to them, it is the responsibility of the administration to undertake the necessary verifications (18) .

In the present case, it was Parliament's Pay and Allowances Unit which was competent to make the necessary verification. Following this verification, the Pay and Allowances Unit confirmed that the complainant's change of category had been properly reflected in the payment of his salary. Therefore, the Ombudsman considers that, starting from the moment when he received this confirmation from the Pay and Allowances Unit, the complainant could have legitimately considered that the secretarial allowance, which was connected to his change of category, was correctly paid to him.



1.7 The Ombudsman also wishes to point out in this respect that the written confirmation of the complainant's salary amount was made by the Pay and Allowances Unit, which was the competent authority within Parliament to deal with the complainant's concerns, followed verbal assurances on the matter, received by the complainant, on several occasions, from the same unit.

1.8 The Ombudsman remains convinced that, following the above e-mail and verbal assurances coming from the competent unit, the complainant could reasonably have ceased to entertain doubts that his salary could have been wrongly calculated. On the other hand, the Ombudsman remains equally convinced that, in light of this email and assurances, the complainant could have formed the view that that calculation was indeed correct.

1.9 The Ombudsman also notes that Parliament takes the view that, according to Article 71(3) of the Financial Regulation, the institution has no margin of discretion regarding the recovery of an established amount receivable. Parliament added that the waiver of such an amount is strictly limited to the cases foreseen by Article 73(2) of the Financial Regulation and Article 87 of the Rules for the implementation of the Financial Regulation.

The Ombudsman however notes that the above-mentioned Articles also refer to cases where recovery can be waived where it is inconsistent with the principle of proportionality . In fact, Article 73(2) of the Financial Regulation clearly establishes the general possibility of waiving recovery. Moreover, Article 87(1)(c) of the Implementing Rules could indeed constitute a solid basis for considering the current recovery order as being disproportionate. Furthermore, Article 87(2) of the Implementing Rules establishes which formal considerations could justify such a decision. A reasonable application of at least (a) and (b) of Article 87(2) would clearly plead in favour of waiving recovery in the present case . The Ombudsman therefore takes the view that Parliament's explanation, as set out in the opinion it sent to the Ombudsman, does not take proper account of all the possibilities of waiving the recovery of a sum unduly paid.

1.10 Finally, the Ombudsman points out that the monies in dispute (it does not matter if they are considered in total or in instalments) reasonably constitute an important sum for every family budget and especially for the budget of a family which includes a handicapped person. Any employer responsible by definition for the welfare of its staff could be expected to adopt a more humane attitude and simply take this into account when requiring its staff to repay the monies that that staff legitimately considered to be due to it on the basis of the information provided by that employer. The Ombudsman therefore shares the disappointment expressed by the complainant, a member of Parliament's staff, towards Parliament's stance in the present case.

1.11 In light of the above, the Ombudsman takes the view that Parliament should consider whether it would be in accordance with the applicable rules, in addition to being fair and reasonable, to cancel the recovery of the amount of EUR 2 821.13, which represents the secretarial allowance paid to the complainant from 14 June 2004 to 26 June 2006.

2 Conclusion

In view of the above, the Ombudsman puts the following draft recommendation to Parliament, in accordance with Article 3(6) of the Statute of the Ombudsman:



Parliament should consider whether, in addition to being fair and reasonable, it would be in accordance with the applicable rules of the Financial Regulation mentioned in point 1.9, to cancel the recovery order for the amount of EUR 2 821.13, which represents the secretarial allowance paid to the complainant from 14 June 2004 to 26 June 2006.

Parliament and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, Parliament shall send a detailed opinion by 30 April 2008. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of the measures taken to implement it.

Strasbourg, 21 January 2008

P. Nikiforos DIAMANDOUROS

(1) 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.

(2) In French: "*Division des Décomptes*".

(3) In French: "*le salaire net mensuel*".

(4) In French: "*Le montant de EUR 3.108.01 que vous avez reçu sur votre compte est bien le salaire net mensuel pour juin (comme fonctionnaire). Le changement de régime temporaire/fonctionnaire à partir du 16 avril a été fait dans la paie de mois de mai*".

(5) In French: "*bulletins de salaire*".

(6) Case T-122/95 *Chabert v Commission* [1996] ECR-SC I-A-19 and II-63.

(7) In French: "*il ne ressort pas de votre dossier que vous ayez fait part de doutes sérieux et précis quant au bien-fondé du versement de l'indemnité de secrétariat elle-même*".

(8) In French: "*vous avez contacté l'unité des Décomptes - à une seule reprise - afin de savoir si la somme versée sur votre compte bancaire correspondait à votre traitement mensuel net du mois de juin 2004*".

(9) Case T-122/95 *Chabert v Commission* [1996] ECR-SC I-A-19 and II-63.

(10) This sum is arrived at by subtracting from the sum of EUR 3 052.15 the secretarial allowance for the period from 16 April to 14 June 2004.



(11) The reply sent to the complainant reads as follows: "*The amount of EUR 3 108.01 that you have received to your account is indeed your monthly net salary for June (as an official). The change of the category temporary agent/official starting 16 April was made in the payment for May.*"

(12) Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 of the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1).

(13) According to Article 71(3) of the Financial Regulation: "*Amounts wrongly paid shall be recovered.*"

(14) See note 1.

(15) See note 2.

(16) The official's e-mail sent to the complainant reads as follows: "*The amount of EUR 3108.01 that you have received to your account is indeed your monthly net salary for June (as an official). The change of the category temporary agent/official starting 16 April was made in the payment for May.*" Translation by Ombudsman's services. The original French text is available in note 3.

(17) This sum is arrived at by subtracting from the sum EUR 3 052.15 the secretarial allowance for the period from 16 April to 14 June 2004.

(18) Case T-107/92 *White v Commission* [1994] ECR-SC I-A-41 and II-143, paragraph 42.