

Proposal of the European Ombudsman for a friendly solution in the inquiry into complaint 1562/2012/JF against the European Commission

Solution - 17/09/2012

Case 1562/2012/JF - Opened on 17/09/2012 - Decision on 01/08/2014 - Institution concerned European Commission (Friendly solution) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant, who is a Commission official, was diagnosed with breast cancer. On 6 April 2010, she underwent a mastectomy to remove the breast with the malignant tumour. She had breast reconstruction surgery on 4 February 2011 and, again, on 24 June 2011. On 13 July 2011, she submitted an application for prior approval of a convalescent cure, which the European Commission refused.

2. On 18 October 2011, the complainant challenged that refusal by lodging an Article 90(2) complaint under the Staff Regulations of Officials of the European Union. She argued that her doctor had confirmed that she would need to undergo, first, a mastectomy and, then, a several-stage breast reconstruction, which was an integral part of the therapy. This had been accepted by the Commission doctors since the Commission acknowledged that her disease was a serious illness justifying full reimbursement of the relevant costs. The complainant emphasised that breast reconstruction could not have started immediately after the mastectomy, but only at a later stage, because the tissues first had to recover (the mastectomy was a very traumatic event from a physical, as well as a psychological, point of view) and the doctor wanted to be sure that there was no risk of relapse before approving the second stage of reconstruction. After the mastectomy, and before the reconstruction surgery, the complainant received physiotherapy for more than half a year to restore the normal use of the affected arm. She had another operation, an areola reconstruction, scheduled for December 2011. The complainant emphasised that she had fulfilled all the necessary requirements and submitted all the required documents in due time. The Commission, however, disregarded the opinion of her doctor that a convalescent cure was needed, without its doctors having ever examined the complainant. Having regard to all of the above, the complainant asked the Commission to review her file thoroughly.



3. The Commission requested the opinion of the Management Committee of the Joint Sickness Insurance Scheme of the European Union on the complainant's case. The Management Committee was unable to reach a majority vote and, consequently, could not issue the requested opinion.

4. On 1 February 2012, the Commission replied to the complainant's Article 90(2) SR complaint. It stated that " *it appear [ed] from the file that the convalescent cure should have taken place from 11 July 2011 to 10 July 2012 in a [...] centre specialis [ed] in convalescent cures [in Member State X] .* " It referred to the Commission Decision laying down general implementing provisions for the reimbursement of medical expenses (the 'GIP') and argued that the Commission's Medical Officer, and later the Medical Council, had carefully examined the complainant's application and the medical documentation enclosed. The Commission added that, having regard to the "[t]ype of illness and the specified intervention [the complainant] underwent [, they] considered that the latter did not justify the convalescent cure - in a [...] specialised centre [of Member State X] . ". In this respect, the Commission "[u]nderlined that the last operation the complainant underwent (June 2011) was a plastic surgery which simply implied a short hospitalisation of 4 days, whereas [her] major operation had already taken place [in] April 2010. " Finally, it noted that, when the complainant applied, she did not mention the centre chosen for the convalescent cure or the costs for it. In the light of the foregoing, " *while regretting the medical situation the complainant went through* ", the Commission confirmed the " *decision of PMO* " of 1 August 2011.

5. On 25 July 2012, the complainant turned to the Ombudsman.

The subject matter of the inquiry

6. The complainant alleged that the Commission's decision refusing to grant her authorisation for a convalescent cure was unfair.

7. The complainant claimed that the Commission should grant her authorisation for a convalescent cure in her country of origin.

The inquiry

8. On 29 November 2012, the Ombudsman forwarded the complaint to the Commission for an opinion.

9. On 12 February 2013, the Ombudsman received the Commission's opinion in French, and on 20 February 2013, its translation into English, which was forwarded to the complainant for her observations. The Ombudsman received the complainant's observations on 3 April 2013.



The Ombudsman's analysis and provisional conclusions

A. Allegation of unfairness and the related claim

Arguments presented to the Ombudsman

10. In support of her allegation, the complainant argued that her doctor considered all the operations she had undergone to constitute one single treatment for her serious illness, which continued to justify a convalescent cure (in addition to the medical certificate already submitted to the Commission, the complainant provided a new medical certificate, dated 17 October 2012). This medical certificate attested that the complainant (in the original French):

"[a] été opérée ... en date du 06.04.2010 d'un cancer du sein. Cette intervention a consisté en une mastectomie avec évidemment axillaire. La patiente a subi par la suite une reconstruction mammaire. Cette reconstruction s'est faite en plusieurs temps. La patiente est par ailleurs sous traitements anti-hormonaux. Il est souhaitable que cette patiente puisse bénéficier de ses jours de convalescence ...".

11. In its opinion, the Commission repeated the explanations it had already given directly to the complainant. It added that it had granted the complainant leave for convalescence purposes, which was justified by the complainant's medical certificates and to which she was fully entitled. However, her reconstructive operations of February and June 2011 were not major surgery and did not involve chemotherapy or radiotherapy. Authorising a convalescent cure was therefore not appropriate.

12. In her observations, the complainant stated that her doctor considered that the institution had misinterpreted her medical opinion. The complainant's doctor therefore issued a new medical certificate, which the complainant annexed to her observations. The complainant emphasised that her doctor confirmed that the three operations were part of one treatment cycle and that the convalescent cure is necessary as it will have a beneficial effect on the complainant's health.

13. She further argued that the Commission's opinion was unwarranted and unjustified from a medical point of view. According to the GIP, all cancers are considered to constitute a serious illness and the rules do not make any distinction between treatments. Therefore, the fact that no chemotherapy or radiotherapy was involved played no role. The complainant underwent three serious, heavy and difficult operations in less than two years and was under hormonal treatment with numerous side effects.

14. Finally, she stated that, contrary to what the Commission argued, she had had no rest for convalescence. She had simply been on periods of sick leave which were necessary to undergo and recover from the operations.



The Ombudsman's preliminary assessment leading to a friendly solution proposal

15. Title II, Chapter 10, Section 1, Paragraph 1, of the GIP provides:

"[c] onvalescent and post-operative cures qualify for reimbursement subject to prior authorisation on condition that:

1. they are carried out under medical supervision in convalescent centres with an appropriate medical and paramedical infrastructure ; all other types of centre are excluded;

2. they commence within three months of the operation or illness in respect of which they have been prescribed, except where there is a medical contra-indication duly justified in the report accompanying the medical prescription and accepted by the Medical Officer. The authorisation may be renewed in the event of a relapse or a new illness. " (emphasis added)

16. The Commission advanced two arguments for refusing to authorise the convalescent cure. First, the complainant failed to indicate the centre in the Member State chosen for the convalescent cure and the costs of the cure. Second, her major surgery, which could justify a convalescent cure, had taken place in April 2010, and her last reconstruction operation was plastic surgery requiring only a four-day stay in the hospital and, in the Commission's view, did not justify the cure.

17. As regards the first of the above arguments, the evidence available to the Ombudsman shows that the complainant's request merely referred to (in the original French) an "*Etablissement spécialisé en [Member State X] en cures de convalescence*". She did not precisely identify the convalescent centre where she wished to register. Her general reference to a "*convalescent centre in [Member State X]*" does not explicitly inform or provide evidence that the centre has "*an appropriate medical and paramedical infrastructure*".

18. The Ombudsman first notes that this deficiency in the application can be easily corrected. The complainant can certainly submit the missing information to the Commission at any time. The Ombudsman also understands that it is much easier for the complainant to identify the centre, check its availability to receive her, and the conditions under which it could provide the convalescent cure, once the Commission authorises the cure in Member State X, her country of origin. In the light of the traumatic experience suffered by the complainant, the Ombudsman understands that the complainant first tried to confirm that she could choose to have a convalescent cure in the Member State which is her country of origin, where she could be close to her family and friends.

19. As regards the Commission's second argument, the Ombudsman emphasises that, according to the article of the GIP cited above, convalescent cures may start within three months of the illness in respect of which they have been prescribed.



20. The complainant's position, corroborated by her doctor, that all her operations were part of one treatment cycle, appears to be correct. The certificate of October 2012, provided by the complainant with her complaint, in addition to the one submitted previously in July 2011, demonstrates the continuous nature of her treatment. The complainant also annexed to her observations a new certificate from her doctor stating that, following the long and difficult treatment she has endured, the complainant needs a convalescent cure. According to the certificate issued by the complainant's doctor on 20 March 2013, the complainant (in the original French):

"[a] été opérée ... en date du 06.04.2010 d'un cancer du sein. Cette intervention a consisté en une mastectomie avec évidement axillaire suivi d'une reconstruction mammaire en deux temps. La patiente est par ailleurs sous traitements anti-hormonaux. Une cure de convalescence aurait des effets bénéfiques sur la santé de la patiente et il est donc nécessaire qu'elle puisse en bénéficier après les traitements lourds subis." (emphasis added)

21. It is thus reasonable to consider that the complainant's illness could be regarded as cured only after her last operation (on 24 June 2011), regardless of the length of all the previous hospital treatments and/or their nature. The complainant is therefore correct to argue that, by submitting the request for a convalescent cure on 13 July 2011, she complied with the time limit of three months after the last of the series of operations she had to undergo [2] .

22. Finally, the Ombudsman notes that the Management Committee of the Joint Sickness Insurance Scheme of the European Union was unable to reach a consensus on the complainant's case and deliver an opinion on it. The Commission's refusal to grant the complainant a convalescent cure was therefore based exclusively on the opinion of its Medical Officer and its Medical Council.

23. In light of all the above, the Ombudsman takes the preliminary view that, when deciding on the request for a convalescent cure, the Commission failed to take into account the fact that the complainant's successive operations constitute one single treatment. This may have amounted to an instance of maladministration, and the Ombudsman will make a proposal for a friendly solution, in accordance with Article 3(5) of her Statute.

B. The proposal for a friendly solution

Taking into account the Ombudsman's findings, the Commission could take into account the fact that the complainant's successive operations constitute one single treatment and accept that the three-month time limit for requesting a convalescent cure started to run from her last operation. Because the complainant complied with that time limit, the Commission could grant her authorisation for a convalescent cure in a centre in Member State X, providing that the complainant also submits evidence of the centre's appropriate medical and paramedical infrastructure .



Emily O'Reilly

Done in Strasbourg on

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] See Paragraph 16 of this friendly solution and Title II, Chapter 10, Section 1, Paragraph 2 of the GIP, according to which: "[t] *he request for prior authorisation must be sent to the Settlements Office together with a medical prescription drawn up within the last three months by a medical practitioner who has no links with a cure centre ...*".