

Decision of the European Ombudsman closing the inquiry into complaint 809/2012/JF against the European Commission

Decision

Case 809/2012/JF - **Opened on** 11/06/2012 - **Recommendation on** 09/09/2014 -

Decision on 24/06/2015 - **Institution concerned** European Commission (Critical remark)

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The case concerned the overpayment of child allowances to a former EU official. The official suffered a stroke and, as a result, lost the ability to read and write, even in his mother tongue, and is unable to manage his affairs. The overpayment was the result of an error on the part of the Commission and occurred despite it having been provided with correct family information by the wife of the former official. After the Commission realised that it had overpaid the former official, it initiated recovery proceedings, arguing that its mistake was of such a nature that it could not have gone unnoticed.

The Ombudsman inquired into the issue and found that the former official could not have discovered the Commission's mistake because of his health condition; nor could his wife be expected to have noticed that the payment had been made in error. The Ombudsman, therefore, tried to convince the Commission to stop the recovery, first by way of a friendly solution proposal, and later by making a draft recommendation. The Commission did not accept either of the Ombudsman's proposals and has now recovered the full amount of the overpayment.

It is an accepted fact that the former official could not have been aware of the overpayment on his pension. The Commission's decision to insist on a full recovery of the overpayment rests on its view that the wife of the former official ought to have the same understanding of the relevant EU Staff Regulations as if she herself were an EU official. In fact, she has never been an EU official. The Ombudsman believes that the Commission's legal reasoning is seriously flawed and she has found the Commission's actions in this case unfair, disproportionate and thus constitute maladministration.

The Ombudsman will notify the European Parliament of this finding which has adversely affected one of its former officials.

The background



1. The complaint was made on behalf of a former official of the European Parliament (the 'EP') who suffered a stroke in 2004 and who, because of his health condition was paid an invalidity pension. Every year since 2004, the former official's wife has informed the EP about their family situation. When their daughter completed her university studies in the beginning of 2007, the European Commission's Office for the Administration and Settlement of Individual Entitlements (the 'PMO') stopped payment of the relevant dependent child allowances. However, following a software problem in November 2008, the PMO resumed those payments retroactively as from September 2007. As a result, in November 2008, the PMO paid a lump sum of approximately EUR 8 000 to the complainant in addition to his pension. Subsequently, it paid approximately EUR 650 to the complainant as dependent child allowances, plus tax abatement, for his daughter, every month. In May 2011, the PMO discovered the overpayment of approximately EUR 28 000 and decided to recover the amounts paid in error through monthly deductions at source of approximately EUR 1 000. The complainant's wife submitted to the Commission that neither she nor her husband realised that there had been a mistake. The PMO referred to Article 85 of the Staff Regulations of Officials of the European Union (the 'SR') [1] and to case-law of the Court of Justice of the European Union (the 'CJEU') to justify its recovery.

2. The Ombudsman opened an inquiry into the alleged unfairness of the PMO's recovery.
Alleged unfair recovery and related claim

The Ombudsman's friendly solution proposal

[2]

3. The Ombudsman pointed out that the health condition of the legal "recipient" [3] of the amount paid in error, that is, of the former official, prevented him from noticing the overpayment. His wife had never worked for the EU and there was no evidence that she was the former official's legal representative. Therefore, the Commission could not apply, in respect of the wife, rules that are binding on EU officials in order to justify its claim for recovery. Hence, it would not have been reasonable to expect the wife to have identified the error and the Commission had no legal obligation to recover the money in these circumstances. Pursuing the recovery would, therefore, amount to maladministration and the Ombudsman proposed a friendly solution to the Commission, on 9 December 2013, that it

" stop its recovery as from the date of [her] proposal ".

4. In its response to the proposed solution, the Commission maintained its position that the recovery was justified on the basis that the former official's wife should have recognised that her husband had been overpaid and should have reported this to the PMO. It appeared to accept that the former official himself could not have been aware of the overpayment.

The Ombudsman's draft recommendation

[4]



5. Given that the Commission maintained its position that the recovery was justified, the Ombudsman then made a draft recommendation to the Commission. In her analysis leading to the recommendation, the Ombudsman noted that the Commission seemed to believe that it is correct to apply the provisions of Article 85 of the SR to the former official's wife (who was not, and had never been, an EU official) on the same terms as they would apply to the former official, had he been in a position to manage his affairs. The Ombudsman regarded this as an unreasonable position to take. In brief, the Ombudsman's view was that (a) the PMO had no legal basis for requiring the former official's wife to accept responsibility for the imposed recovery of the overpayment as if she herself was the "recipient", and (b) even if there were such a legal basis, the circumstances of this case did not support the conclusion that she was aware that her husband was being overpaid. The Ombudsman's draft recommendation, made on 9 September 2014, was that

"[t] he Commission should rescind its decision to recover the overpayment and restore to the complainant the amount already recovered. "

6. The Ombudsman invited the Commission, when replying to the draft recommendation, to take proper account of the good faith of the former official's family, of their very difficult situation, and of the fact that the overpayment arose because of an error made by the PMO, despite having been given accurate information by the former official's wife.

7. In its reply, the Commission stated that it takes proper account of situations where former staff members can no longer deal with their affairs themselves. The PMO's first contacts with the former official's wife took place after it had informed her husband that the payment had been a mistake. The fact that she is not, formally, her husband's representative should have no impact on the assessment of how the PMO handled the case.

8. The Commission said that it communicated with the former official and his wife in English (though the first note notifying the recovery was sent in French). In addition, the complainant's pay slips were all in Danish. According to the Commission, all of the essential information was, therefore, provided in languages perfectly understandable by the former official and his wife.

9. The Commission did not agree that the overpayment was particularly complex or difficult for the former official and his wife to understand. In this respect, it referred to the *Chabert* judgment in which the (then) Court of First Instance ruled that salary slips are not illegible or incomprehensible and that reading them is a relatively easy exercise [5]. This is, in the Commission's view, particularly true for pension slips, which contain information regarding the pension, the deductions for social security and taxes, and family allowances only.

10. The Commission referred to further judgments of the EU courts [6] in support of its view that it has an obligation to recover the overpayment. It said that, when deciding to proceed to a recovery in the present case, it had regard to the following considerations: (i)



in the case of the initial lump sum overpayment, made in November 2008, the former official received double the amount normally received; it was therefore impossible that such a substantial overpayment would not be noticed; (ii) the pay slip containing the lump sum overpayment was written in Danish (which meant that it could easily be understood by the complainant's wife) and consisted of three pages (instead of one), each sent in a separate envelope; so the complainant's wife could not have failed to notice that there was something unusual; and (iii) that the particular pension slip contained figures in 13 extra columns (all indicating the terms " *child allowance* " and " *taxes due* " in Danish), while a normal pension slip contains figures in only one column [7] . In light of all the above, the Commission concluded that both the nature of the overpayment and the terminology used in the pension slip were easily understandable to the former official and his wife. According to the Commission, the argument of the former official's wife, to the effect that she thought that the payments concerned " *annual adjustments* ", cannot be reconciled with the description in the pension slips. It was easy to understand that the payments in question corresponded to an allowance for a child and that they were in addition to the child allowance that was being paid for their other child.

11. The Commission therefore concluded that the former official's wife should have known that there was an overpayment, or at least should have had doubts about the legality of the payment, " *which is what the case-law requires* ". Even if she had not realised that the payment was made in error, she could have contacted the services she had been in contact with in relation to her husband's pension and obtained the necessary information. The Commission is obliged to recover the overpaid amounts, in accordance with Article 85 of the SR, even if it understands the difficult situation of the complainant's family and regrets having committed a mistake that led to that situation.

12. In her observations, the former official's wife reiterated her previous arguments and expressed her profound frustration at the Commission's reply.

The Ombudsman's assessment after the draft recommendation

13. The Ombudsman appreciates that the Commission must be careful and responsible in its handling of EU taxpayers' money. The Ombudsman appreciates also that the amount of the overpayment (EUR 28 000) is significant and that it is more than some EU citizens earn in one year. At the same time, it is important that the Commission should behave fairly and with due regard for the specific circumstances of the former official and his family. In circumstances where (as the Ombudsman believes) the Commission was not legally obliged to recover the overpayment, it was open to it to find a solution which balanced the requirements of good financial management with fairness and consideration for a former official and his family. The Ombudsman is very disappointed that the Commission has rejected both of her proposals to resolve this case.



14. The Commission has never contested the statements of the former official's wife that her husband " *can no longer read or write, even in his mother tongue* ", Danish, because of his health condition [8] . It is therefore not in dispute that, because of his condition, the former official is not in a position to manage his affairs [9] and could not reasonably have been expected to detect the overpayment. It is therefore unreasonable for the Commission now to argue that, because the pay slips were in Danish and contained more information than usual, the former official ought to have discovered the Commission's mistake. By doing so, the Commission appears to hold the former official liable in circumstances where, quite plainly, he cannot be held liable because of his health condition.

15. According to Article 85 of the SR, on which the Commission based its decision to recover the overpayment, "[a] *ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it* ". The " *recipient* " of the overpayment in this case was the former official; due to his health condition, he could not have understood that there was no due reason for the extra payment, even if the overpayment had been obvious. The Commission considers that the scope of application of Article 85 of the SR (which is binding on EU officials only) should be extended to the former official's wife, who is neither his legal representative nor an EU official.

16. The Commission refers to case-law of the EU courts in support of its position. The Ombudsman notes, however, that the case-law cited by the Commission concerns EU officials, not spouses of EU officials or other members of their family.

17. The former official's wife was not the recipient of the overpayment nor is she, and has never been, an EU official. It is, therefore, difficult to see on what basis the case-law cited by the Commission, which concerns the interpretation of rules binding on EU officials , could apply to her.

18. Even if it were legally correct to apply Article 85 of the SR to the former official's wife, it would still be necessary, in applying the provision, to have regard to her different understanding of the situation. It would not be reasonable and equitable to apply the same test to her as would be applied to an actual EU official (such as her husband, had he been in good health) [10] .

19. The former official's wife has confirmed that she noticed the extra lump sum payment in November 2008. However, her position is that she assumed this extra payment was some kind of retroactive payment. Even allowing that the pay slips were in Danish, this position is nevertheless plausible. The fact that the relevant pay slip mentioned the term " *child allowances* " did not necessarily mean that the former official's wife had to have understood that the lump sum payment could not have been an adjustment in respect of the elder child and, therefore, that the lump sum was being paid in error. In fact, the Ombudsman found this payslip quite confusing. It was far from clear to the Ombudsman that the additional payment of EUR 8 000 related solely to child dependant allowances. In fact, only approximately EUR 900 of the lump sum amount quite clearly related to child



dependant allowances; and it was unclear how the remaining EUR 7 100 was to be explained.

20. The Ombudsman notes that the Commission does not dispute that the former official's wife correctly filled in and submitted to the EP the questionnaire relating to her family's situation, on a regular basis. The family, therefore, acted in good faith all along and the Commission has acknowledged that the overpayment resulted solely from a mistake made by the PMO. Even though the Commission states that it understands the difficult situation of the family, and that it regrets having made a mistake " *which led to this situation* ", the Ombudsman is deeply disappointed by the fact that the Commission did not take the opportunity offered by her inquiry to take responsibility for its error by seeking to minimise its negative impact on the former official and his family.

21. The Ombudsman's conclusion in this case is that the Commission's action in recovering the full overpayment was unfair and disproportionate [11] and constituted maladministration. This situation is all the more regrettable given that it was open to the Commission to have acted in accordance with the requirements of good administration. Leaving to one side the strictly legal issue of whether or not the former official's wife should be bound by the requirements of Article 85 of the SR, it is simply wrong for the Commission to have treated her as if she were an EU official. Even more so is this the case in light of the specific and very difficult circumstances of the family. While there is no argument of financial hardship for the family as a result of the recovery, the actions of the Commission reflect a lack of flexibility and of sensitivity.

22. As the Commission has failed to avail of the opportunity, provided by the Ombudsman's inquiry, to find a fair and proportionate settlement in this case, the Ombudsman therefore closes the case with a critical remark.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission's recovery of the full overpayment in the present case was unfair and disproportionate. This constituted maladministration.

The complainant and the President of the Commission will be informed of this decision. The Ombudsman will also inform the President of the European Parliament of this inquiry, and of its outcome, given that it involves a former official of Parliament.

Emily O'Reilly

Strasbourg, 24/06/15



[1] " *Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.* "

[2] For the full text of the Ombudsman's friendly solution proposal, see:
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54660/html.bookmark>

[3] Article 85 of the SR provides that sums overpaid may be recovered "[i] *f the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.* "

[4] For the full text of the Ombudsman's draft recommendation, see:
<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/54690/html.bookmark>

[5] Case T-122/95 *Daniel Chabert v Commission* [1996] ECR SC-I-A-19 ; SC-II-63, paragraph 39.

[6] Case T-324 *F v Commission* [2007] ECR SC-I-A-2-127; SC-II-A-2-861, paragraph 137; Case F-18/08 *Ritto v Commission* [2008] ECR SC-I-A-1-281; SC-II-A-1-1495, paragraph 31; and Case F-91/13 *DF v Commission* , judgment of the Civil Service Tribunal of 1 October 2014, not yet published in the ECR, paragraph 39.

[7] The Commission provided the following explanation: " *this particular pension slip consists of different columns: the first one indicates the various components of the pension (in Danish) and then the other columns indicate the months for which a payment was made. A normal pension slip will have figures only in the column for the month concerned. The November 2008 pension slip of the complainant had 13 extra columns , each indicating an amount corresponding to the child allowance and tax allowance for the period covering September 2008 (in the column with the heading "200809") going back to September 2007 (in the column with the heading "200709")* ".

[8] See paragraph 46 of the Ombudsman's friendly solution proposal.

[9] See paragraph 7 of the Ombudsman's draft recommendation.

[10] See paragraph 8 of the Ombudsman's draft recommendation.

[11] Articles 6 'Proportionality' and 11 'Fairness' of the European Code of Good Administrative Behaviour provide that: "[w] *hen taking decisions, the official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued ... The official shall act ... fairly and reasonably .*"