

Decision of the European Ombudsman closing the inquiry into complaint 2041/2014/DK against the European Commission regarding transfer of pension rights

Decision

Case 2041/2014/DK - Opened on 14/01/2015 - Decision on 25/05/2016 - Institution concerned European Commission (No maladministration found) |

The case concerned the Commission's decision to change its original proposal on the transfer in of the complainant's pension rights, acquired in the UK pension scheme, into the EU pension scheme.

The Commission argued that it was required to change its original proposal as it had been based on General Implementing Provisions which were already out of date at the time its proposal was made. The Commission's revised proposal, which was less favourable to the complainant, was based on the revised General Implementing Provisions actually in place at the date of the original proposal. The complainant argued that the Commission should honour its first proposal that he had already accepted.

The Ombudsman inquired into the issue and found that the General Court had ruled that the Commission was not legally required to make proposals on the transfer in of pension rights acquired outside of the EU pension scheme and that, in fact, an actual determination of the worth of such transferred pension rights could be given only after the transfer had been made. In fact, this was a practice established by the Commission simply to better inform its officials about what they could expect once they actually decided to request the transfer in of their pension rights into the EU pension scheme.

The Ombudsman therefore closed the complaint with a conclusion that there was no maladministration by the Commission.

The background to the complaint

1. The complaint concerns a dispute between an official of the European Commission and the Commission regarding the transfer of the complainant's national pension rights to the Pension Scheme of the European Union's Institutions (EU pension scheme).



2. In December 2009, the complainant requested the transfer of his pension rights acquired in one of the Member States to the EU pension scheme. In May 2010, the Commission proposed that his pension rights would be transformed into 6 years and 2 months of pensionable service in the EU pension scheme, and that the "*remainder of the capital to be transferred (EUR 17 599,27) would be reimbursed*" to the complainant (the initial proposal). The complainant accepted the proposal in June 2010.

3. In May 2011, the Commission informed the complainant that it was obliged to revise its earlier proposal as it was based on the earlier General Implementing Provisions, which had become obsolete as of 1 January 2009 [1] . On the basis of the new (2011) General Implementing Provisions, the Commission made a new proposal of 5 years, 7 months and 12 days, with no monies to be reimbursed to the complainant (revised proposal). The complainant did not accept the revised proposal as he considered that the Commission should have honoured its initial proposal that he had accepted. After unsuccessfully complaining to the Commission, the complainant turned to the Ombudsman in July 2013 (complaint 1405/2013/DK).

4. The Ombudsman opened an inquiry and obtained the opinion of the Commission. The Commission drew attention to the fact that there were already 32 cases pending before the European Civil Service Tribunal concerning the same issue [2] and queried whether it was appropriate for the Ombudsman to become involved. The Ombudsman considered that complaining to the Ombudsman is a fundamental right under EU law, as Article 43 of the EU Charter on Fundamental Rights makes clear. Therefore, restrictions on the right to complain to the Ombudsman, such as those provided for in Articles 1(3) and 2(7) of the Ombudsman's Statute [3] , need to be interpreted strictly. The Ombudsman therefore took the view that these restrictions, which apply where the facts on which a complaint is based are before a court, did not apply in the present case. In the Ombudsman's view, for the restrictions to apply the case before a court must concern the complainant's own case. However, the Ombudsman also found, having examined the pending court cases, that it was clear that the Civil Service Tribunal would deal with the issue of the applicability of the new implementing rules, the core issue raised by the complainant in his complaint. In light of the above, the Ombudsman considered that there were not sufficient grounds to inquire further into the complaint and closed it on 4 December 2013.

5. In December 2013, the Civil Service Tribunal gave its judgment [4] in Case F-117/11. The Tribunal found that the Commission's decisions, to withdraw its initial offers to officials who had already accepted those offers before the entry into force [5] of the 2009 General Implementing Provisions, were illegal.

6. In July 2014, the complainant made a complaint under Article 90(2) of the Staff Regulations to the Commission to contest, on the basis of the judgment of the Civil Service Tribunal, the note of 20 May 2011, in which it put forward its revised proposal.

7. In October 2014, the Commission rejected the complaint as inadmissible. It explained that Article 90(2) of the Staff Regulations requires a complaint to be lodged within a period of three



months. The complainant received the contested decision on 20 May 2011. He therefore missed the above deadline. Also, the complainant had already made an Article 90(2) complaint contesting the same Commission decision. By decision of 26 July 2011, the Commission had rejected that complaint. Finally, according to the established case-law, decisions of the Civil Service Tribunal cannot be considered to be a "new fact" for the complainant that would allow the three-month period to start again. In any case, the Tribunal's decisions to which the complainant refers were given on 11 December 2013 so the new period of three months would have ended in March 2014. The complainant did not lodge his complaint under Article 90(2) of the Staff Regulations until July 2014.

8. In December 2014, the complainant submitted the present complaint to the Ombudsman. The complainant's main grievance was that the Commission replaced its initial proposal, after he had accepted it, with a less favourable one. He had made a relevant Article 90(2) complaint, on time, in 2011. The Commission rejected it. Then, in December 2013, the Civil Service Tribunal found that the Commission's practice, in the complainant's type of situation, was illegal.

9. The Ombudsman considered that it would clearly be unfair to close a case on the grounds that the issue raised by the complainant was pending before a court and then to reject a further complaint submitted after the court had ruled on that issue. While it was true that the complainant did not turn to the Commission again until seven months after the above judgment was given, the Ombudsman had regard to the fact that the complainant had already made an Article 90(2) complaint and she considered that the period it had taken him to get back to the Commission in 2014 was not unreasonable or excessive.

10. In addition, the Ombudsman found sufficient grounds to open an inquiry in view of the findings of the Tribunal that the Commission's decisions to replace its initial offers, if they had been accepted by the officials concerned *before* the entry into force of the new General Implementing provisions, were illegal. Moreover, the Tribunal held that Article 9 of the 2011 GIP, on which the Commission's revised decisions were based, was unlawful and thus actions based on that provision were null and void. The Ombudsman considered that, in such circumstances, it was good administrative practice to reconsider decisions based on that rule which had not been the subject of court proceedings but had been challenged by an Article 90(2) complaint and subsequently in a complaint to the Ombudsman.

The inquiry

11. The Ombudsman therefore asked the Commission to provide an opinion on the complaint and state whether it envisaged revisiting its earlier (initial) proposals in line with the above findings of the Tribunal.

12. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.



The Ombudsman's assessment and conclusions

13. In its opinion, the Commission pointed out that, in two [6] of the cases mentioned above, appeals had been made to the General Court and the judgments of that [7] Court were expected in the coming months. Referring to Article 228 of the Treaty on the Functioning of the European Union [8] , to Articles 1(3) [9] and 2(7) [10] of the Ombudsman's Statute, to Article 10(3) [11] of the Ombudsman's Implementing Provisions, and to the fact that the core of the cases pending before the Court was the same as the core of the complainant's complaint to the Ombudsman, the Commission considered that the Ombudsman should close the present complaint without further ado.

14. In his observations, the complainant did not dispute the fact that his grievance concerned the same issue as the one pending before the General Court in the above two cases.

15. The General Court gave its decisions [12] in both cases on 13 October 2015. The Ombudsman carefully examined the two judgments and finds that they rule on the same legal issues as those raised in the present complaint.

16. In this context, it is worth noting that the Court found that neither the 2004 Implementing Provisions, nor the 2009 Implementing provisions [13] required the Commission to send a "proposal" to officials who requested the transfer-in of pension rights acquired in other pension regimes into the EU pension scheme. The Court also found that this was a practice established by the Commission simply to inform officials about what they could expect should they actually decide to request the transfer-in of their pension rights acquired in other pension regimes [14] . The Court pointed out that, in accordance with Article 11, paragraph 2 of Annex VIII to the Staff Regulations, the precise determination of the number of years to be credited under the EU pension scheme can happen only after the actual transfer by the national authorities has taken place and only "on the basis of the capital transferred" [15] .

17. In light of the above, the Ombudsman finds that the Commission had acted in accordance with the relevant rules, as subsequently interpreted by the Court, when it made a new proposal to the complainant concerning the transfer-in of his pension rights acquired outside of the EU pension scheme. Given that an actual determination of the worth of the complainant's transferred pension rights could be made only after the transfer by the national authorities, any "proposal" made in advance by the Commission would be purely advisory and not binding on the Commission. The Ombudsman therefore considers that there was no maladministration by the Commission.

18. However, the Ombudsman points out while the Commission had no obligation to calculate the likely worth of the transferred pension rights, and the actual worth of the transferred rights could be determined only after the transfer had taken place, it would have been good administrative practice for the Commission to inform its officials that its "proposal" was not legally binding. Nonetheless, in view of the above, the Ombudsman considers that no further



inquiries are justified into this aspect of the complaint.

Conclusion

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

The Ombudsman finds no maladministration by the Commission.

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

[1] Council Regulation N°1324/2008 of 18 December 2008 changed the interest rate provided for under Article 8 of Annex VIII of the Staff Regulations, used in actuarial calculations related to the EU pension scheme. The Commission also explained that the new 2011 implementing provisions put in place new conversion coefficients, which allowed the Commission to make the correct calculations concerning the complainant's transferable pension rights.

[2] Cases F-117/11; F-130/11; F-131/11; F-134/11; F-136/11; F-138/11; F-18/12; F-29/12; F-31/12; F-42/12; F-44/12; F-55/12; F-61/12; F-62/12; F-66/12; F-75/12; F-88/12; F-91/12; F-108/12 ; F-112/12; F-144/12; F-146/12; F-147/12; F-152/12; F-18/13; F-19/13; F-23/13; F-25/13; F-35/13; F-38/13; F-39/13 and F-40/13.

[3] On the basis of Articles 1(3) and 2(7) of the Ombudsman's Statute, a complaint cannot be examined by the Ombudsman if the facts on which it is based are pending before a court.

[4] Most relevant parts of the Tribunal's judgment can be summarised as follows:

- the Commission's view that Regulation No 1324/2008 rendered the 2004 GIP obsolete and automatically devoid of legal basis as regards the method for calculating the number of pensionable years to be credited is legally incorrect, since the justification for such a view disregards both the scope of that regulation and Article 11(2) of Annex VIII to the Staff Regulations;
- according to a generally accepted principle, a new rule applies immediately to situations yet to arise and to the future effects of situations which arose, but were not fully constituted, under the old rule (judgment of 13 June 2012 in Case F 31/10 Guittet v Commission, paragraph 47 and the case-law cited).



- in order for the situation of an official or staff member who has made a request to 'transfer in' to have been fully constituted under the 2004 GIP, it must be established that, by the end of the day preceding the date of entry into force of the new conversion coefficients laid down in the 2011 GIP (31 March 2011), the person concerned had accepted the proposal concerning additional pensionable years which had been made to him under the 2004 GIP;
- in the present case, the Commission has not proved that the purpose to be achieved demanded the retroactive application of the 2011 GIP. Furthermore, it has not demonstrated that a compelling overriding interest required it to apply the 2011 GIP retroactively.
- the application of the conversion coefficients laid down in Annex 1 to the 2011 GIP before the entry into force of those general implementing provisions on 1 April 2011, to officials or other staff members who had accepted a proposal concerning additional pensionable years before 1 April 2011, necessarily infringed the legitimate expectations of those officials or other staff members (see, to that effect, *Guittet v Commission*, paragraph 66).
- Article 9 of the 2011 GIP must be declared unlawful in so far as it provides for the application of the conversion coefficients laid down in Annex 1 to the 2011 GIP to officials and other staff members who accepted a proposal concerning additional pensionable years before the entry into force of the 2011 GIP;
- the initial proposals, which applied the 2004 GIP, were not unlawful in any way and could not therefore be withdrawn.

[5] 3 March 2011.

[6] Cases F-130/11 and F-117/11.

[7] T-104/14 P, T-131/14 P.

[8] "*In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings.*"

[9] "*The Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling.*"

[10] "*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 enquiries he has carried out up to that point shall be filed definitively.*"

[11] "*If legal proceedings are instituted in relation to matters under investigation by the Ombudsman, he closes the case. The outcome of any inquiries he has carried out up to that*



point is filed without further action. "

[12]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=169701&pageIndex=0&doclang=FR&mode=lst&dir>

[Link] and

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=169662&pageIndex=0&doclang=FR&mode=lst&dir>

[Link]

[13] See paragraph 42 of the judgement in Case T-131/14 P.

[14] See paragraph 43 of the judgement in Case T-131/14 P.

[15] See paragraph 52 of the judgement in Case T-131/14 P.