

Decision in case 1034/2016/BKB concerning the determination of the place of origin and subsistence allowance for a Seconded National Expert working for the European Research Council Executive Agency (ERCEA)

Decision

Case 1034/2016/BKB - **Opened on** 09/09/2016 - **Decision on** 23/11/2016 - **Institution concerned** European Research Council Executive Agency (No maladministration found) |

Staff that are seconded from a national administration to work in an EU institution are entitled to receive a daily allowance from the EU institution concerned. The present case concerned a dispute over the precise amount of daily allowance paid to a Seconded National Expert who worked first for the European Commission and then for the European Research Council Executive Agency ('ERCEA'). The complainant considered that she should have received the full allowance whereas the ERCEA considered that she was only entitled to 25% of the allowance.

The Ombudsman inquired into the matter and found no maladministration. The primary reason for reaching this conclusion was because the complainant had, as the ERCEA argued, lived in Brussels prior to her secondment to work in the EU institutions.

The background to the complaint

1. The complainant moved to Brussels in May 2002 to work for the Bavarian Regional Office. She started working for the European Commission as a Seconded National Expert ('SNE') on 1 May 2008 [1]. On 1 December 2008, she was seconded to the European Research Council Executive Agency ('ERCEA'), where she worked until 20 April 2014.
2. When she started working for the Commission, it informed her that she would receive a daily allowance of 29.73 EUR, which was 25% of the usual daily subsistence allowance at that time. The reason she was given only 25% of the allowance was that the full allowance was only available to SNE's hired from a Member State **outside the place of employment**. The Commission took the view that as she was resident in Brussels for three years prior to her secondment, she was not entitled to the full allowance.
3. Shortly before the complainant's secondment to the ERCEA ended, she made a request [2] for the ERCEA to consider Augsburg, Germany, as her 'place of origin'/'deemed residence'



instead of Brussels. She asked for her daily and monthly subsistence allowance to be adjusted accordingly (since such allowances vary according to the staff member's 'place of origin'/'deemed residence'). She argued that Brussels had never been her 'place of origin' or her 'deemed residence'. She argued that her work at the Bavarian Regional Office was of a temporary character and that she never moved permanently to Brussels. She stated that she was still renting an apartment in Augsburg, Germany. She added that her work required frequent trips to Bavaria, Germany. Her family was living in Bavaria. She also argued that the Bavarian Regional Office forms part of the Bavarian State Ministry for Federal and European Affairs, which has its registered office in Germany.

4. The ERCEA replied on 4 July 2014, stating that the complainant's request was inadmissible.

5. It first noted that the complainant had made her request on the basis of Article 90(1) of the Staff Regulations, which was not applicable to SNEs. Nevertheless, the ERCEA stated that it would deal with the request.

6. The ERCEA stated that it informed the complainant's Permanent Representation in November 2008 that the complainant would now work at the ERCEA and that her legal and financial conditions remained unchanged [3] . The ERCEA stated that the complainant had not contested these conditions, nor had she contested the amount of her daily allowance at that time. Given that the complainant knew the conditions under which she would work for the ERCEA, she should have made a complaint at the time when she started working for the ERCEA, in accordance with Article 27 of the rules on secondment of SNEs [4] .

7. The ERCEA further argued that, in line with settled case-law, which should be applied by analogy to Article 27 of the rules on secondment of SNEs, a staff member cannot circumvent the deadlines set out in Articles 90 and 91 of the Staff Regulations by making a subsequent request for a decision to be changed. Only substantial new facts may justify the possible reconsideration of a decision which has become final.

8. The complainant appealed this decision on 20 September 2014, maintaining that, for the purpose of determining her daily allowances, 'Augsburg', Germany, should have been considered her 'place of origin/deemed residence' instead of Brussels.

9. The ERCEA [5] replied on 16 December 2014, stating that the complaint was time-barred and therefore inadmissible. The complainant made her complaint referring to Article 90(2) of the Staff Regulations, which is not applicable to SNEs. The ERCEA therefore treated the complainant under Article 22 of its rules applicable to SNEs [6] , which states that a complaint against an act adversely affecting the SNE should be made within two months. The complainant missed that deadline.

10. On the substance, the ERCEA also stated that the decision on the complainant's 'place of origin'/'deemed residence' as Brussels, Belgium, was correct and in line with settled case-law [7] , given that the complainant started working in Brussels, in the Bavarian Regional Office, already on 1 May 2002, thus " *exceeding the period established in the applicable rules* ".



11. The complainant then turned to the Ombudsman on 8 July 2016, maintaining her arguments as put forward to the ERCEA and referring to the European Ombudsman's Decision in case 141/2011/RT, which, in her view, has some similarities with her case.

The inquiry

12. The Ombudsman opened an inquiry into the complainant's concern that the ERCEA failed to determine the complainant's 'place of origin'/'deemed residence' in line with the applicable rules on secondments of SNEs.

13. The complainant wishes the outcome of the Ombudsman's inquiry to be that the ERCEA determine 'Augsburg' in Germany as her 'place of origin'/'deemed residence' as of when she started working for the ERCEA, and that it recalculates her subsistence allowance accordingly.

The Ombudsman's assessment

14. The Ombudsman notes that the ERCEA raised a number of procedural arguments to support its view that the complainant's case should not even be examined at this stage. However, the Ombudsman notes the ERCEA did, despite its insistence that the complainant's request to have her case reviewed was inadmissible, look at the complainant's request to the ERCEA to determine her place of origin. As a result, the ERCEA has given the complainant a detailed explanation on the substantive issue and the reasons as to why she was paid 25% of the daily allowance only. The ERCEA's efforts to try to clarify the matter are commendable.

15. As regards the clarifications provided by the ERCEA, the complainant lived in Brussels from 2002 to May 2008 while working for Bavarian Regional Office. She then worked for the Commission for a few months before starting to work at the ERCEA.

16. According to the applicable rules [8], periods working for a State or for an "international organisation" in the same state as her place of work shall not be counted when setting the reference period for determining the place of origin/deemed residence and the daily allowances linked thereto. Working for a "State" includes working for a Permanent Representation of EU Member States. Working for an "international organisation" includes working for an EU institutions or for another international body such as NATO (which also has its seat in Brussels).

17. As the ERCEA rightly pointed out, according to case-law, the time spent working for a German Land **does not count as work for a "State"**.

18. Moreover, the Ombudsman does not agree that work for the Bavarian Regional Office for **six years** can be considered to be of a temporary nature. Indeed, the rules themselves establish what is "temporary"; work for a period of more than three years of a reference period cannot be considered to be "temporary". Finally, the fact that the complainant rented a flat and had family in the Germany during the reference period cannot take from the fact that she worked and lived in Brussels during that period. The ERCEA was thus right to consider that the



complainant was resident in Brussels during the three year reference period [9] . The decision on the complainant's daily allowance was thus correct.

19. In order to hopefully further alleviate the complainant's concerns about not having been correctly treated, it is useful to clarify that the situation in the case of the European Ombudsman referred to by her (0141/2011/RT) is not comparable with hers [10] .

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion [11] :

There was no maladministration by the ERCEA.

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

23/11/2016

[1] The complainant's secondment was governed by the Commission Decision C(2006)2033 of 01.06.2006 laying down rules on the secondment of national experts to the Commission ('rules on secondment of SNEs').

[2] Under Article 90(1) of the Staff Regulation, to be applied by analogy in case not applicable to SNEs.

[3] " *The European Research Council Executive Agency was set up by a Commission Decision 2008/37/EC on*

14.12.2007 to manage Community action in the fields of frontier research in application of council Regulation No 5812003. There are currently national experts seconded to the Research Directorate-General services that will be decentralised to this agency. The Commission envisages transferring these national experts from the Commission to the agency as from 01.12.2008. (. . .). 'The secondment of Ms [the complainant] to the Research DG was initially arranged for the period from 01.05.2008 to 30.04.2009. If the employer of Ms [the complainant] agrees, she will be seconded to the executive agency on 01.12.2008 for the remaining period of the agreed secondment to the Commission plus one year; (. . .) The conditions of this secondment remain those governed by the "Rules Applicable to

National Experts Seconded to the Commission" approved by the Commission on 01.06.2006, and the amendments approved by the Commission on 14.05.2008. "

[4] Commission Decision C(2006)2033. Article 27: " *Any SNE seconded for more than 6 months may submit to the Unit of DG Personnel and Administration responsible for complaints and*



requests under the Staff Regulations a complaint against an act under this Decision by Commission services, adversely affecting him except decisions which are direct consequences of decisions taken by his employer. The complaint must be lodged within two months. The period shall start to run on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification.(...) ”

[5] More specifically the Authority Responsible for concluding contracts of employment of the ERCEA

[6] Decision StC16022010/2d of the Steering Committee of the ERCEA laying down the rules applicable to seconded national experts and national experts in professional training at the ERCEA. Article 22: “ *Without prejudice to the possibilities for instituting proceedings after taking up his position, under the conditions and time limits laid down in Article 263 of the Treaty on the Functioning of the European Union, any SNE may submit a complaint to the Unit responsible for complaints and requests at the Agency about an act adopted by the Agency under this Decision which*

adversely affects him, with the exception of decisions which are direct consequences of decisions taken by his employer. The complaint must be lodged within two months. The period shall start to run on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification (...). ”

[7] The ERCEA referred to the case *Herta Adam v. Commission* (C-211/06P), in which the applicant had been working for more than 5 years in Belgium in a German regional office prior to joining the Commission as an official. The court stated in this ruling that work for a regional office could not be considered as 'services provided to the State' as per the wording of Article 4 of Annex VII to the Staff Regulations.

[8] Both the Commission Decision C(2006)2033 of 01.06.2006 laying down rules on the secondment of national experts to the Commission and the subsequently applicable Decision StC16022010/2d of the Steering Committee of the ERCEA laying down the rules applicable to seconded national experts and national experts in professional training at the ERCEA.

[9] Article 17(5) of the rules on secondment of SNEs (Commission Decision C(2006)2033), applicable at the time, set out that, seconded national experts “*who, during the three years ending six months before the secondment, have habitually resided or carried on their main occupation at a distance of 150 km or less from the place of secondment shall receive 25% of the daily allowance. For the purpose of this paragraph, circumstances arising from work done by SNEs for a State other than that of the place of secondment, or for an international organisation, shall not be taken into account*”.

[10] [10] In that case, the place of origin had been correctly determined when the person concerned joined the EU civil service but it was later - wrongly - changed when that person moved to another EU Agency.



[11] Information on the Ombudsman's review procedure can be found on the [website \[Link\]](#)