

## Otsus juhtumi 906/2009/JF kohta - Ekslikult makstud summade tagasinõudmist käsitlev vaidlus

Otsus

**Juhtum** 906/2009/JF - **Alguskuupäev:** {0} 26/06/2009 - **Otsuse kuupäev:** {0} 18/10/2010

Abiteenistujast kaebuse esitajale raha maksmisel tegi komisjon mitu viga: kõigepealt jättis maksmata summad, millele kaebuse esitajal oli õigus, hiljem maksis välja toetused, millele kaebuse esitajal õigust ei olnud, ning lõpuks maksis kaebuse esitajale veel kord summa, mida ei oleks pidanud maksuma.

Osa kaebuse esitajale liigselt makstud kogusummast nõudis komisjon tagasi. Ombudsmanile saadetud kaebuses vaidlustas kaebuse esitaja aga ülejäänud summa tagasinõudmise. Oma väite toetuseks tõi ta välja komisjoni arvukad vead ning oma keerulise finantsolukorra tol ajal.

Ombudsman märkis, et komisjonil oli seaduslik alus kõnealune summa kaebuse esitajalt tagasi nõuda. Sõbralikku lahendit välja pakkudes kutsus ombudsman aga komisjoni üles oma korduvate haldusvigade eest vastutama ja tagasinõudmisest loobuma.

Komisjon tõestas, et on valmis kaebuse esitaja jaoks soodsa tulemuse saavutamisel ombudsmaniga koostööd tegema, ning tühistas hüvitamisnõude. Oma otsuses tunnustas ombudsman komisjoni lähenemist ja lõpetas juhtumi.

The background to the complaint

1. From 1 June 2001 to 31 October 2003, the complainant worked for the European Commission as an auxiliary agent. She provided evidence that she had one child, for whom the Commission paid her a dependent child allowance.
2. In November 2001, due to an encoding error in its payments system, the Commission granted the complainant an allowance for a second dependent child (the 'second allowance' [1]), which was backdated to August 2001.
3. In December 2001, the complainant was paid the second allowance for the period between August and November 2001. From December 2001 until February 2003, the complainant received the second allowance every month. In March 2003, the situation was brought back to normal [2]. The total amount paid in error in respect of the second



allowance was EUR 5 162.38.

**4.** On 7 April 2003, the Commission informed the complainant that it had made the above error and invited her to attend a meeting in order to discuss what the financial implications would be for her.

**5.** The complainant did not attend a meeting with the Commission. She replied that she would not agree to any recovery.

**6.** On 23 April 2003, the Commission informed the complainant that, according to its final calculations, the amount overpaid was EUR 3 368.40. The Commission explained that it reached the above figure by deducting EUR 1 793.98 from the overall amount of EUR 5 162.38. The amount deducted corresponded to a sum which had been deducted by mistake from the complainant's salary, on the erroneous assumption that she was receiving allowances from elsewhere. This, in fact, proved not to be the case.

**7.** On 24 April 2003, the Commission informed the complainant that, in order to recover the total amount due, namely, EUR 3 368.40, it would retain monthly instalments of EUR 842.10 from her salary for the months May to August 2003 inclusively, which was when her contract would end.

**8.** On 23 June 2003, the Commission informed the complainant that, following an exceptional extension of her contract, it had established that the remaining amount to be recovered was EUR 1 684.20. It informed the complainant that this sum would be recovered through monthly retentions of EUR 421.05 from her salary for the months July to October 2003 inclusive, which was when her extended contract would end.

**9.** On 14 May 2003, the Commission paid to the complainant, again by mistake, EUR 1 793.98, in addition to her salary for that month. This mistake arose due to errors experienced during the change from an old to a new payments system.

**10.** On 14 December 2006 and 1 February 2007, the Commission tried to inform the complainant about the above payment, which had been made by mistake by means of two registered letters which were sent to her address. These letters were returned marked "addressee absent".

**11.** The complainant meanwhile started a new period of employment with the Commission, as a temporary agent.

**12.** On 11 April 2007, the Commission sent the complainant an e-mail informing her of the above payment of EUR 1 793.98 which had been made by mistake. The complainant did not reply.

**13.** On 27 July 2007, the Commission sent the complainant a debit note No. 3240907257 (the 'debit note') by registered mail and e-mail, claiming reimbursement of the above



amount by 9 September 2007. The complainant replied on the same day, stating that the money had already been retained from her salary at the relevant time.

**14.** On 20 September 2007, in the absence of payment, the Commission sent to the complainant a reminder by registered letter. This letter was returned marked "unclaimed" ("*non réclamée*").

**15.** On 18 October 2007, the complainant contested the legitimacy of the debit note and refused to pay back the amount in question.

**16.** On 20 November 2007, the Commission replied to the complainant and again explained how the debt had arisen. It drew her attention to the fact that, as she was already aware, the Commission had mistakenly paid her a second allowance which amounted to a total of EUR 5 162.38. In this respect, the Commission referred to its e-mail of 23 April 2003 and emphasised that, in that communication, it had informed the complainant that, in order to compensate the balance due, she would not receive the sum of EUR 1 793.98 to which she was in fact entitled. However, the said sum of EUR 1 793.98 was not retained by the Commission as announced. The payment of EUR 1 793.98, made on 14 May 2003, was, therefore, made in error [3]. As a result, EUR 1 793.98, a part of the original debt of EUR 5 162.38, was never recovered. The Commission conceded that "[i]t was true and very regrettable" that the complainant's file contained a number of errors [4], but it was, nevertheless, also true that the Commission had overpaid the complainant and, therefore, had to claim back the overpaid amounts. Even though the Commission did not write to the complainant until 14 December 2006, [5] informing her of the situation and requesting her to reimburse the EUR 1 793.98, which had been paid to her in error, the Commission was still within the five-year deadline to be entitled, and even obliged, to claim back the amounts unduly paid. Nonetheless, in light of the complainant's circumstances, the Commission was ready to accept payment of the above amount in monthly instalments of EUR 150 over a period of 11 months, with one last instalment of EUR 143.98.

**17.** On 28 November 2007, the complainant refused to repay the said amount to the Commission, emphasising that she was unemployed and unable to make the repayment.

**18.** On 14 December 2007, the Commission invited the complainant to provide it with information concerning her income by 28 December 2007. In particular, it asked for details of her unemployment allowance and her family situation in order to be able to draw up a reimbursement plan which would be more compatible with her financial means. The complainant did not reply.

**19.** On 29 January 2008, the Commission sent the complainant a reminder, inviting her to reply by 11 February 2008. In the absence of any reply, the Commission stated that it would proceed to a forced reimbursement.

**20.** On 1 February 2008, the complainant replied, denying that she was a debtor and asking the Commission to stop harassing her.



- 21.** On 7 October 2008, the Commission issued a decision (the 'Decision'), pursuant to Article 256(1) of the then EC Treaty [6] , concerning the recovery of allowances unduly received by a former auxiliary agent. It declared the complainant to be a debtor for the main amount, plus interest for late payment, amounting to a total of EUR 1 903.88.
- 22.** On 23 March 2009, a bailiff sent the complainant a copy of the Decision and ordered her to pay the Commission the main amount, plus interest for late payment, amounting, on that date, to a total of EUR 2 188.34. Payment was to be made within 15 days, under penalty of seizure of her movable property.
- 23.** On 26 March 2009, the complainant wrote to the Commission requesting it to stop the recovery procedure. She emphasised the mistakes made by the Commission and pointed out that it had already retained 30% of her salary in the past. She added that, in any event, she had no financial means with which to reimburse the amount in question.
- 24.** On 7 April 2009, the complainant turned to the Ombudsman for the first time and complained about the above matter. As a result, the Commission decided to suspend the recovery procedure until the Ombudsman reached a decision.
- 25.** The complainant subsequently informed the Ombudsman's services that her last contract with the Commission had ended in May 2009. She stated that she expected to start drawing the Belgian monthly unemployment benefit of approximately EUR 1 200. In June 2009, that is, after submitting her complaint to the Ombudsman, the complainant had not yet received any such benefit.  
The subject matter of the inquiry
- 26.** The complainant alleged that the Commission's claim for reimbursement of EUR 2 188.34 (the amount of the debt on 23 March 2009) was unfair.
- 27.** The complainant claimed that the Commission should cancel its reimbursement claim.  
The inquiry
- 28.** On 26 June 2009, the Ombudsman forwarded the complaint to the President of the European Commission for an opinion.
- 29.** On the same date, and on 16 July 2009, the complainant sent the Ombudsman further correspondence clarifying her complaint. The Ombudsman forwarded this correspondence to the President of the European Commission and requested that the Commission's opinion take into account the clarifications contained therein.
- 30.** On 21 October 2009, the Ombudsman received the Commission's opinion, which he forwarded to the complainant with an invitation to make observations. The complainant first submitted some further information and then submitted her observations on the Commission's opinion on 29 October 2009.
- 31.** On 2 March 2010, the Ombudsman's services and the complainant discussed matters



relating to her complaint by telephone.

**32.** On 3 March 2010, the complainant completed her observations by forwarding to the Ombudsman a document pertaining to her financial situation.

**33.** After a careful consideration of the opinion and the observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. He therefore made a provisional finding of maladministration and, in accordance with Article 3(5) of his Statute, proposed a friendly solution to the Commission.

**34.** On 8 July 2010, the Ombudsman received the Commission's reply, which he forwarded to the complainant with an invitation to make observations. Although no observations were received in reply to the above invitation, the Ombudsman took into consideration for this purpose some further correspondence received from the complainant in the meantime, on 29 May 2010.

The Ombudsman's analysis and conclusions

## **A. Allegation of unfairness and the related claim**

### Arguments presented to the Ombudsman

**35.** The complainant alleged that the Commission's reimbursement claim for EUR 2 188.34 (the amount of the debt on 23 March 2009) was unfair.

**36.** In support of this allegation, the complainant argued that the Commission (i) was aware that she was unemployed and had no means to pay the above amount; (ii) made the undue payments in the knowledge that she had only one child and not two; and (iii) after discovering its error and subsequently retaining EUR 3 368.40, committed the same error yet again. It was this latter error which gave rise to the above claim for reimbursement.

**37.** The complainant claimed that the Commission should take the above arguments into due consideration and cancel its claim for reimbursement.

**38.** In its opinion, the Commission first pointed out that the complainant was working in the Commission as a temporary agent when she submitted her complaint to the Ombudsman, and when the Commission launched the recovery procedure. She was, therefore, receiving a salary and would have been able to pay her debt. However, she had no intention of doing so. This was attested by the lack of any reaction to the Commission's letter dated 14 December 2007, which provided for reimbursement in instalments that were compatible with her income.

**39.** The Commission then went on to refer to Article 85 of the Staff Regulations of Officials of the European Communities [7] (the 'Staff Regulations'). It emphasised that, although the amounts in question were paid as the result of an error made by the Commission, in light



of the applicable case-law [8] , this was of no consequence because the above article is applicable precisely in cases where the administration has committed errors and made irregular payments. The complainant's debt was, therefore, indisputable and subject to repayment.

**40.** In the Commission's view, the overpayments it made could not have gone unnoticed by a normally diligent official. In this respect, it emphasised that such an official is not exempted from checking his or her salary, and he or she is expected to know the rules applicable to his or her pay. In exercising his or her duty of diligence, it is not necessary for the person in question to determine precisely the extent of the administration's error. If an official has doubts about the legitimacy of a payment received, this alone is sufficient reason for him or her to have to notify the administration in order for it to be able to carry out all the necessary checks.

**41.** In light of the above, the Commission considered that the complainant could not have failed to notice the payment of approximately EUR 1 000 in December 2001, or, following that payment, the monthly payments of approximately EUR 300 in addition to her salary. The complainant should have notified the administration and allowed it to proceed with all the necessary checks. Similarly, in light of the Commission's explanations provided to her on 23 April 2003, the complainant could not have been unaware of the fact that the EUR 1 793.98 paid to her on 14 May 2003 was the result of an error, since precisely this amount was explicitly mentioned in the letter dated 23 April 2003. It follows that the complainant should have notified the Commission and allowed it to carry out all the necessary checks.

**42.** The Commission thus maintained that the complainant owed it an amount of EUR 1 793.98, plus interest for late payment. It stated that it was prepared to accept payment on the basis of a reimbursement plan with instalments which would be compatible with the complainant's income.

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

**43.** First, the Ombudsman noted that the Commission considered itself entitled, in accordance with Article 85 of the Staff Regulations, to recover sums overpaid to the complainant as a result of **a number of its own administrative** errors.

**44. The first administrative error** was the Commission's repeated error, which occurred every month from December 2001 to March 2003, of paying the complainant an allowance to which she was not entitled, that is, the second allowance. In total, the Commission wrongly overpaid the complainant EUR 5 162.38.

**45.** In this respect, the Ombudsman drew attention to the payment slips for December 2001 and January 2002, which the Commission submitted with its opinion, and which were



forwarded to the complainant for her observations. The complainant did not contest them. These attested that, in December 2001, the Commission made five payments to the complainant of EUR 224.43 each, and, in January 2002, one payment of EUR 232.73 as a second allowance.

**46.** In light of this evidence, the Ombudsman considered it reasonable to believe that the complainant must have been aware of these repeated payments. In light of the fact that she had only one child and not two, she must also have been aware that these payments were made in error. It followed that it would have been normal for the complainant to expect to have to repay from her salary the overall amount of **EUR 5 162.38**, which resulted from the overpayment considered as a whole.

**47.** On 23 April 2003, however, the Commission informed the complainant that the amount to be reimbursed was lower than that resulting from the overpayment. The Commission explained that it had committed a **second administrative error** by wrongly deducting EUR 1 793.98 from the complainant's salary. It clarified that this amount would not be repaid to the complainant, but would rather be deducted from her overall debt of EUR 5 162.38 to the Commission. According to the Ombudsman's understanding of the relevant facts, the complainant then became convinced that her debt to the Commission amounted to **EUR 3 368.40**.

**48.** However, in May 2003, due to a change in its payments system, the Commission committed a **third administrative error** and **paid** the complainant **EUR 1 793.98**. Although the complainant reimbursed the total amount of EUR 3 368.40, as claimed by the Commission in its letter dated 23 April 2003, she did not take any action in response to this final payment which was made in error.

**49.** It was, therefore, important to establish whether the complainant could have been expected to be aware of the Commission's third administrative error. This could be done by carrying out a similar analysis to that made above with regard to the Commission's first administrative error.

**50.** Neither the Commission nor the complainant, however, submitted a copy of the letter dated 23 April 2003. The Ombudsman could not, therefore, attest with certainty whether that letter referred to the sum of EUR 1 793.98 or the exact terms of such a reference.

**51.** The complainant had become accustomed to the Commission's repeated errors. The circumstances were confusing, with one action of the Commission contradicting another. It was, therefore, plausible that the complainant did not know whether, by October 2003, the monthly deductions from her salary had reached a final total of EUR 5 162.38 or EUR 3 368.40. The Ombudsman did not consider that the Commission's letters dated 24 April or 23 June 2003 helped to clarify the above confusion by providing a reimbursement plan based on monthly retentions from the complainant's salary of first, EUR 842.10, and later, EUR 425.05.



**52.** Similarly, although it could be argued that it was reasonable for the Commission to consider that the complainant could not have been unaware of the overpayment of the second allowance, the Ombudsman was not at all convinced that this continued to be reasonable in view of the confusing series of events which ensued as a result of its actions. First, the Commission explicitly stated that it had wrongly deducted a certain amount from the complainant's salary, namely, an amount which was unrelated to her debt resulting from the overpayment of the second allowance. Later, it repaid that very amount, only, finally, to claim that same amount back again, stating that the repayment should not have been made in the first place, since it corresponded to an amount that should have been deducted from the complainant's debt to the Commission, that is, the debt which resulted from the Commission's own erroneous payment of the second allowance.

**53.** To sum up, the complainant was first informed in April 2003 that she did not have to reimburse the amount of EUR 1 793.98 because the Commission had made a mistake. Then, four years later, in April 2007, she was finally informed that she would have to reimburse that very amount because the Commission had, almost four years previously, made yet another mistake concerning, again, that very same amount.

**54.** The Commission relied on the applicable case-law of the Court of Justice of the European Union, and Article 85 of the Staff Regulations, which do not exclude an administration from the possibility of claiming back amounts which it may have paid out by mistake.

**55.** The above case-law should not, however, be interpreted as giving permission for administrative mistakes to be made. In the present case, the Commission made **repeated** administrative mistakes. The Commission certainly did not act in a way which is to be expected from an institution committed to good administration. Rather, its actions could come across as disproportionate and inconsistent and thus reinforce a provisional finding of maladministration [9] .

**56.** The Ombudsman noted the Commission's decision to suspend the recovery procedure until he reached a decision on the complaint. In his view, this indicated that the Commission was ready to cooperate with him in order to find the most satisfactory outcome to the dispute and to rectify the instance of maladministration identified provisionally above. The Ombudsman thus invited the Commission to demonstrate that it was fully prepared to accept responsibility for the unusual number of mistakes which occurred in the present case, and cancel its claim for reimbursement from the complainant, who was living on unemployment benefits. He therefore made the following proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman:

"Taking into account the Ombudsman's findings, the Commission could cancel its claim for reimbursement."





## The arguments presented to the Ombudsman after his friendly solution proposal

57. The Commission took into account the Ombudsman's analysis and provisional conclusions and accepted to cancel its claim for reimbursement.

58. The complainant agreed that the complaint could be closed and thanked the Ombudsman.

## The Ombudsman's assessment after his friendly solution proposal

59. The Ombudsman welcomes the Commission's cooperation in seeking a satisfactory outcome to the present complaint. Accordingly, he closes the case.

## B. Conclusion

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

**The Ombudsman welcomes the Commission's cooperation in seeking a satisfactory outcome to the present complaint. Accordingly, he closes the case.**

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

P. Nikiforos Diamandouros

Done in Strasbourg on 18 October 2010

[1] In the original French: "*allocation pour une personne assimilée à un deuxième enfant à charge* "

[2] In the original French: "[i] *a situation a été régularisée avec le salaire de mars 2003.* "

[3] In the original French: "[m] *alheusement, se montant de 1.793,98 € n'a pas été retenu et vous a été payé par erreur le 14 mai 2003.* "

[4] In the original French: "[i] *I est vrai et fort regrettable que votre dossier contienne une série d'erreurs...* "



[5] In the original French: "[1] *a première lettre vous informant et vous demandant de rembourser le 1.793,98 € n'a malheureusement été envoyée que le 14 décembre 2006.* "

[6] "*Decisions of the ... Commission which impose a pecuniary obligation on persons other than States, shall be enforceable.* " The Treaty of Lisbon, in force since 1 December 2009, provides for a similar provision in Article 299 of the Treaty on the Functioning of the European Union that "[a] *cts of the ... Commission ... which impose a pecuniary obligation on persons other than States, shall be enforceable.* "

[7] "*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.* "

[8] Case T-324/04 *F v Commission* , judgment of of the Court of First Instance (Third Chamber) of 16 May 2007, not yet reported in the ECR, paragraph 139 (in the original French): "*... le fait que l'administration a commis une négligence ou une erreur dans la détermination des droits pécuniaires d'un fonctionnaire est sans incidence sur l'application de l'article 85 du statut, qui présuppose précisément que l'administration a commis une erreur en procédant au versement irrégulier ...* "

[9] Articles 6 'Proportionality' and 10 'Legitimate expectations, consistency and advice' 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 be consistent with his own administrative behaviour as well as with the administrative action of the Institution. The official shall follow the Institution's normal administrative practices, unless there are legitimate grounds for departing from those practices in an individual case ... The official shall respect the legitimate and reasonable expectations that members of the public have in light of how the Institution has acted in the past ... "*