Cinneadh i gcás 1226/2008/OV - Leithdháileadh spás páirceála in áirithe d'oifigeach le míchumas

Cinneadh
Cás 1226/2008/OV - **Tosaithe an** 06/06/2008 - **Cinneadh an** 19/02/2010

Bhí tionóisc thromchúiseach ag an ngearánach, oifigeach de chuid an Choimisiúin Eorpaigh, i mí Feabhra 2001, agus mar thoradh fágadh le heasláine bhuan de 4% í. Ó mí na Bealtaine 2004, ceadaíodh spás páirceála in áirithe don ghearánach i gceann de charrchlóis an Choimisiúin, ar bhonn bliantúil. I mí Lúnasa 2007, áfach, bhí dochtúir an Choimisiúin den tuairim nár cheart an chéad síneadh eile a údarú ach le haghaidh tréimhse sé mhí. Bheartaigh an Coimisiún, dá bharr sin, an spás páirceála in áirithe a cheadú don tréimhse laghdaithe seo. Ghearán an gearánach chuig an gCoimisiún, ach é gan thoradh rathúil. Scríobh dochtúir an ghearánaigh go dochtúir an Choimisiúin ar 21 Feabhra 2008, ag iarraidh air athbhreithniú a dhéanamh ar a thuairim. Ina litir, leag dochtúir an ghearánaigh amach na cúiseanna cén fáth ar mheas sé gur cheart go leanfaí ar aghaidh ag ceadú spás páirceála curtha in áirithe don ghearánach.

Ina gearán chuig an Ombudsman, líomhain an gearánach gur theip ar an gCoimisiún déileáil lena hiarratas ar bhonn cothrom agus ceart. Go háirithe, chuir sí ina leith nach ndearnadh measúnú ar a riocht sláinte i gceart. Ina thuairim féin, ghlac an Coimisiún leis an tuairim go raibh bunús maith lena chinneadh.

Fuair an tOmbudsman nár sholathair an gearánach cáipéisí a d'fhéadfadh an tuairim a bhí ag dochtúir an Choimisiúin a cheistiú sular thug an Coimisiún faoi na cinntí ábhartha maidir lena hiarratas agus a gearán, agus dá bharr sin nach raibh aon drochriarachán bainteach le cinneadh an Choimisiúin. Thóg an tOmbudsman faoi deara, áfach, gur chuimsigh an litir ó 21 Feabhra 2008, scríofa ag dochtúir an ghearánaigh, tuairim ar léir a bhí difriúil ón tuairim a bhí ag dochtúir an Choimisiúin. I dtuairim an Ombudsman, chuige sin ba cheart go mbeadh an Coimisiún tar éis scrúdú cibé an riabh air iarratas an ghearánaigh a athhreithniú. Tháinig an tOmbudsman ar an gconclúid sealadach go raibh ásc drochriaracháin i gceist le teip an Choimisiúin a leithéid a dhéanamh. Dá bharr sin mhol sé réiteach cairdiúil, ag tabhairt cuireadh don Choimisiún a chinneadh a athbhreithniú.

Ghlac an Coimisiún le moladh an réitigh chairdiúil agus chuir sé in iúl don Ombudsman go ndearna sé athbhreithniú ar an gcás agus gur bheartaigh sé spás páirceála in áirithe a cheadú don ghearánach don dá bhliain a bhí fágtha dá gairm. Léirigh an gearánach go raibh sí go hiomlán sásta le toradh an cháis, go háirithe toisc go bhfuil an spás páirceála in áirithe ceadaithe di go dtí go dtéann sí ar scor. Dhún an tOmbudsman an cás mar sin.

THE BACKGROUND TO THE COMPLAINT

1. On 22 February 2001, the complainant, a European Commission official, was the victim of a serious accident, as a result of which a permanent invalidity of 4 % was recognised. The complainant applied for a reserved parking space, which the Commission granted him with effect from 20 May 2004. The reservation was renewed on a yearly basis. After the Commission doctor examined the complainant on 9 August 2007, he took the view that the next extension should be authorised for six months only, and no further extension should be granted. On 9 August 2007, in reply to the complainant's e-mail which he sent immediately after his medical visit, the Commission doctor informed him that reserved parking spaces could be made available for the following medical reasons: (i) if the person concerned was in possession of a certificate of disability emanating from a Member State, (ii) after three months of pregnancy, (iii) temporarily for persons who have recently undergone a hip, ankle, knee or spinal column operation, (iv) in cases of obvious walking problems, and (v) in very specific situations (for example, morbid obesity). On 13 August 2007, in light of the doctor's opinion, the Commission's Infrastructure and Logistics Office decided that a reserved parking space should be granted to the complainant for a further period of six months only.

2. On 28 August 2007, the complainant sent an e-mail to the Director of Directorate C (Social policy and Health) within Directorate-General Personnel and Administration ('DG ADMIN'), describing the background of his medical condition. He stated that he suffered from epicondylitis of the left arm, that he had to wear a prosthesis day and night, and that he suffered from reduced mobility. In her reply of 6 September 2008, the Director pointed out that she could not intervene in a decision of a purely medical character.

3. On 8 November 2007, the complainant submitted a complaint pursuant to Article 90(2) of the Staff Regulations, against what he considered to be the 'decision' adopted on 9 August 2007 by the Commission doctor. The complainant noted that he had benefited from a reserved parking space for nearly four years. He pointed out that his medical condition was not improving but deteriorating, that he suffered from epicondylitis of the left arm and had to wear a prosthesis day and night. He, therefore, claimed that the authorisation to use a reserved parking space should be prolonged beyond the period of six months that had been granted. In his complaint, the complainant alleged that the most recent extension was not sufficiently reasoned, and that the relevant officials in the Commission's Medical Service and in DG ADMIN refused to get involved in decisions of a medical character. He also alleged that the Director of DG ADMIN's Directorate C had breached Article 8 of the European Convention on Human Rights, which guarantees medical confidentiality, by sending an e-mail containing information concerning his medical condition to five persons within DG ADMIN who were not entitled to receive such information. The complainant argued that the principle of non-discrimination was breached, since, after the expiry of the authorisation granted to him to use a reserved parking space, he would be treated as if he had no mobility problem. He concluded that the decisions taken were illegal and should be withdrawn. The complainant claimed that one symbolic euro should be paid to him on account of the errors committed by the Commission.

4. On 20 December 2007, the Appointing Authority rejected the complaint. First, it pointed out that the alleged decision of the Commission doctor was merely an opinion and a preparatory act relating to the decision concerning the reserved parking space. The latter

decision fell within the competence of the Commission. The Appointing Authority recalled that, according to established case-law, preparatory acts cannot be challenged. The complaint was, therefore, inadmissible in so far as it was directed against the doctor's decision.

5. Second, as regards substance, the Appointing Authority took the view that granting a reserved parking space does not constitute a statutory right, but merely a favour. The Appointing Authority noted, however, that criteria concerning the authorisation to use a reserved parking space had been published on the Commission's Intranet [1] . It referred, in particular, to the third criterion: " *entitled* [2] *to a reserved parking space on medical grounds (depending on the number of available spaces): Officials with medical problems at the sole request of the Medical Service of the Commission and for a limited period only, to be determined by the Medical Service* ". The Appointing Authority pointed out again that, in the present case, according to the opinion of the Commission doctor, an extension of only six months was to be granted.

6. Finally, the Appointing Authority explained that it cannot substitute its own views for those of the doctor. As regards the alleged failure to provide sufficient reasons, the Appointing Authority recalled that the doctor's opinion did not constitute a decision and thus did not need to be reasoned. It added, however, that the complainant had been informed of the reasons for the doctor's negative opinion immediately after his examination on 9 August 2007. In the Appointing Authority's view, the complainant had been fully informed of the reasons for the relevant decision.

7. On 21 February 2008, the complainant's doctor wrote to the Commission doctor asking him to revise his opinion. The complainant's doctor referred to the complainant's accident in 2001, and the symptoms of a cervical hernia *(hernie discale cervicale)* which ensued. In January 2002, surgery was required to fit a cervical prosthesis. He submitted that it was well-known that cervical hernias can be very dangerous and evolve badly, given their proximity to a nerve centre of primary importance. He pointed out that, even after many years, the complainant was still having mobility problems, particularly where repeated head movements were required. Such movements are prejudicial, especially after the fitting of a prosthesis. He concluded by stating that the complainant's health would be at great risk if he had to move his neck in an extreme manner in order to park his car. He also stated that he did not normally write such letters, but that the complainant's condition was too serious to be ignored.

THE SUBJECT MATTER OF THE INQUIRY

8. In his complaint to the Ombudsman of 28 April 2008, the complainant alleged that there had been (i) an error in the evaluation of his medical condition, (ii) a breach of medical confidentiality, (iii) discrimination (given that other persons in the same situation would have been able to benefit from arbitration) and (iv) an absence of clear and transparent criteria and, thus, a breach of the principle of good administration.

9. As regards allegations (i) and (iv), the Ombudsman noted that, according to the Appointing Authority's reply of 20 December 2007, the Commission considered i) that the Commission doctor's opinion did not need to be reasoned and ii) that no effective remedies were

available against decisions rejecting a request for a reserved parking space. The Ombudsman pointed out that the present case raises a serious question of principle. He noted that it was both appropriate and useful to combine the two allegations mentioned above into one single allegation, namely, that the Commission failed fairly and properly to handle the complainant's application to be granted a reserved parking space. The Ombudsman asked the Commission if, in its opinion, it could address the two issues set out above.

10. The Ombudsman further asked the Commission to state whether it considered granting a reserved parking space for officials with an invalidity as a favour or privilege, or rather as part of the notion of " *reasonable accommodation* " foreseen in Article 1(d)(4) of the Staff Regulations. He also asked whether the Commission considered that any such dispute should follow the procedure laid down in Article 33 of the Staff Regulations, which foresees a medical committee composed of three doctors.

11. As regards allegation (ii), the Ombudsman informed the complainant that there were no grounds for him to carry out a new inquiry because the decision of the European Data Protection Supervisor (the EDPS) of 26 May 2008, had already dealt with this allegation in the complaint the complainant had submitted to him (ref. 2007-0611). In his decision, the EDPS took the view that there were legal grounds for forwarding the e-mail to the persons concerned, but that the medical details should not have been disclosed to those recipients who were not members of the medical staff. The EDPS, therefore, concluded that forwarding the medical details to these persons had been excessive and in breach of Article 4(c) of Regulation (EC) 45/2001 [3] . The Ombudsman also pointed to paragraph 2.B (Avoiding duplication of procedures) of the Memorandum of Understanding between the European Ombudsman and the European Data Protection Supervisor [4] , which provides that "[n] *either authority envisages opening an inquiry if the other authority is dealing, or has dealt, with what is essentially the same complaint ...* ".

12. As regards allegation (iii), the Ombudsman initially informed the complainant that he considered it inadmissible, on the basis of Article 2(8) of the Ombudsman's Statute, because the complainant had not raised this issue in his Article 90(2) complaint. However, in a further letter from the complainant dated 9 June 2008, he explained that it was only after he had made the Article 90(2) complaint that he had been informed that other officials had been able to benefit from arbitration. The Ombudsman, therefore, considers that the alleged discrimination should also be included in the inquiry.

THE INQUIRY

13. On 28 April 2008, the complaint was lodged with the Ombudsman. It was forwarded to the Commission for an opinion. On 2 July 2008, the Ombudsman asked the Commission to also comment on the third allegation.

14. The Commission sent its opinion on 25 September 2008. The opinion was forwarded to the complainant, who sent his observations on 20 November 2008.

15. On 30 September 2009, the Ombudsman made a proposal for a friendly solution between the complainant and the Commission. On 27 November 2009, the Commission

replied, accepting the friendly solution proposal. The Ombudsman forwarded the Commission's reply to the complainant. In a telephone conversation of 18 December 2009 with the Ombudsman's Office, the complainant's lawyer confirmed that the Ombudsman's proposal for a friendly solution had been successful.
THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Preliminary remark

16. The Ombudsman notes that the present inquiry concerns two allegations, namely, (i) that the Commission failed fairly and properly to handle the complainant's application for an authorised reserved parking space, and (ii) that there was discrimination. The Ombudsman considers it appropriate to deal with these two allegations together, in point B below.

B. Alleged failure fairly and properly to handle the complainant's application and alleged discrimination

Arguments presented to the Ombudsman

17. The complainant alleged that the Commission failed fairly and properly to handle his application for a reserved parking space. The complainant further alleged that there had been discrimination because other persons in the same situation would have been able to benefit from arbitration.

18. In its opinion, the Commission pointed out that it could only confirm what the Appointing Authority had already stated in its decision of 20 December 2007.

19. As regards the Ombudsman's questions, the Commission reiterated its view that granting a reserved parking space to officials with an invalidity was *not* a right. It stated that such a view confirmed implicitly that the present case did not give rise to any issues related to the " *reasonable accommodation* " foreseen in Article 1(d)(4) of the Staff Regulations. The Commission argued that this provision was not relevant in the present case, given that the complainant was not a " *person with a disability* " whose " *impairment* [has been] *determined according to the procedure set out in Article 33* ".

20. According to the Commission, disputes concerning reserved parking spaces should not follow the Article 33 procedure of the Staff Regulations. In the Commission's opinion, this Article applies in cases where a medical examination was carried out before the member of staff concerned was appointed. The Commission underlined that if such a medical examination led to negative conclusions, it could result in the person concerned not being recruited. Given this grave and serious consequence for the person in question, Article 33 of the Staff Regulations foresees a procedure which guarantees that the candidate's rights of defence are respected. The Commission considered that it would be completely disproportionate to follow this procedure in the case of a dispute concerning a reserved parking space. In the Commission's view, the Staff Regulations did not contain any provision covering the subject-matter of the present complaint. The Commission concluded that the

complaint submitted to the Ombudsman was not well-founded.

21. As regards the alleged discrimination, the Commission pointed out that the Medical Service had, in the meantime, introduced an arbitration procedure whereby a second assessment of an applicant's medical condition can be carried out. It stated that the complainant could now ask for his case to be reviewed by submitting an application to Mr F., Head of Unit of the Medical Service. This procedure was introduced several months after the complainant lodged his Article 90(2) complaint, and had not, therefore, been available when the relevant decision was taken.

22. In his observations, the complainant recalled the case-law of the Community courts, according to which the obligation to provide reasons is an essential principle of Community law. The complainant pointed out that it was undisputed that the decision adopted in 2004 to grant him a reserved parking space was based on his medical condition, namely, a permanent invalidity, resulting from an accident, and recognised as such by an invalidity committee. He submitted that his mobility problems represent a disability which requires reasonable accommodation. In its opinion, the Commission merely stated that the complainant did not have a disability at the time of his recruitment. The Commission failed to address the question of the measures which need to be taken when an official becomes disabled *during* his or her career. The complainant further stated that his disability should constitute the basis for positive discrimination within the meaning of Council Directive 2000/78/CE of 27 November 2000, establishing a general framework for equal treatment in employment and occupation [5] . He referred to Court of Justice case-law which states that this Directive should not be interpreted restrictively [6] . The complainant concluded by stating that the grant of a reserved parking space did not, therefore, constitute a favour or privilege, but it was simply the application of the fundamental principle of equal treatment. Reasons, should, therefore, be given for the withdrawal of the parking space.

23. The complainant argued that the position taken by the Commission, namely that there is no requirement for reasons to be given for the decision, went against the principle of non-discrimination, the obligation to provide reasons and the principle of good administration. Furthermore, he considered that the Commission acted inconsistently by arguing that it did not have to take his medical condition into account when justifying its decision to no longer grant him the reserved parking space, when it was his medical condition which originally constituted the grounds for the decision made in 2004 to grant him the reserved parking space. The complainant stated that it was not within the Commission's competence to evaluate medical data. Any decisions it makes are, therefore, purely confirmative of medical opinions. He also stated that there was nothing in the Staff Regulations to prevent a medical committee being appointed in a case such as his.

24. As regards the alleged discrimination, the complainant stated that he was happy with the Commission's decision to re-examine the litigious decision. He pointed out, however, that the details concerning this procedure had not been defined by the Commission. For example, the Commission did not indicate whether the complainant could be represented by his doctor. The complainant, therefore, invited the Commission to provide the Ombudsman with this information, as well as the time limit within which a new decision could be expected.

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

25. The Ombudsman noted that the opinion of the Commission doctor of 9 August 2007 played a clearly decisive role in how the Commission reached the decision it subsequently adopted. However, the fact remained that this opinion was not in itself a decision, but was, rather, a preparatory act for the Commission's decision. The duty to give reasons thus only needed to be assessed as regards the Commission's decision.

26. In its opinion, the Commission reiterated that the grant of a reserved parking space is not a statutory right, but merely a favour. The Commission also took the view that Article 1(d)(4) of the Staff Regulations, which refers to the notion of reasonable accommodation, did not apply in the present case. The Ombudsman considered that there was no need to pursue these issues any further. The Commission needed, however, to decide whether to grant the complainant a reserved parking space and the Ombudsman considered that the Commission needed to handle the complainant's request fairly, properly and without discrimination.

27. As regards formalities, the Ombudsman noted that, according to established case-law of the Community Courts, the requirement for a statement of reasons, such as the one foreseen in Article 25 of the Staff Regulations, must be assessed by taking into account all the circumstances of the case, in particular the measure at issue and the nature of the reasons relied on [7] . In the present case, it appears that the Commission's Infrastructure and Logistics Office established six criteria for granting reserved parking spaces. According to these criteria, a reserved parking space is made available on medical grounds " *at the sole request of the Medical Service of the Commission and for a limited period only, to be determined by the Medical Service* ". Moreover, five medical grounds [8] exist on the basis of which reserved parking spaces can be granted. The Ombudsman noted that the decision reached on 13 August 2007 by the Commission's Infrastructure and Logistics Office, did not contain any reasons. However, during the medical visit of 9 August 2007, the complainant was informed of the opinion of the Commission doctor. The complainant was thus aware that the decision of 13 August 2007 was based on this opinion. The Ombudsman, therefore, took the view that the complainant was clearly aware of the reasons for the Commission's decision of 13 August 2007.

28. As regards the substantial question of an alleged error in the evaluation of the complainant's medical condition, the Ombudsman considered that the Commission was entitled to base its decision on the opinion of the Commission doctor, unless there was reason to call it into doubt. The complainant does not appear to have done so when the original decision of 13 August 2007 was taken, and when the Appointing Authority made its decision of 20 December 2007 on the Article 90(2) complaint. In his submissions, the complainant referred to his medical condition, but there were no documents in the file to show that his comments were backed-up by evidence. The Commission was thus entitled to take the view that the complainant's comments did not call into question the opinion of the Commission doctor of 9 August 2007.

29. It followed from the above that there had been no maladministration concerning the

Commission's decision. The Ombudsman noted, however, that the complainant criticised not only the decision, but also the way the Commission handled his application in general. As mentioned above, the complainant's doctor wrote to the Commission doctor on 21 February 2008, asking him to revise his opinion. The Ombudsman is clearly not qualified to assess the contents of this letter which concerned a purely medical issue. He noted, however, that this letter contained a medical opinion which appeared to differ from that of the Commission doctor. In the Ombudsman's view, the medical opinion expressed by the complainant's doctor should have made the Commission consider whether it needed to revise its position. He considered the fact that the letter of 21 February 2008 was addressed to the Commission doctor, and not to the Commission, to be irrelevant. It appeared, however, that the complainant's application had not been re-examined in light of the new medical evidence submitted by his doctor. While it is clear that the Commission is not competent to deal with medical issues, it could, however, have asked the doctor who issued the opinion of 9 August 2007 to consider the arguments put forward by the complainant's doctor, or, better still, it could have referred the issue to another doctor for a second opinion.

30. In its opinion regarding the alleged discrimination, the Commission explained that it had now adopted a procedure which provides for a second assessment of an applicant's medical condition by means of an arbitration procedure. The adoption of such a procedure showed that such a review was possible. The Ombudsman applauded the Commission's decision to introduce this procedure but he was nevertheless of the opinion that the Commission should have applied the required principles of good administration when it dealt with submissions, such as those in the present case, which originated in circumstances predating the adoption of the new procedure. These principles of good administration required that the Commission should have handled the complainant's request fairly and properly, and it should have given due consideration to the letter of 21 February 2008, written by the complainant's doctor, which contained a different opinion to that of the Commission doctor. The Ombudsman's provisional conclusion was, therefore, that the Commission's failure to do so constituted an instance of maladministration.

31. On the basis of the above considerations, the Ombudsman made a proposal for a friendly solution. He invited the Commission to reconsider its decision regarding the complainant's request for a reserved parking space, duly taking into account the letter from the complainant's doctor dated 21 February 2008.

32. In view of the conclusion reached in the previous paragraph, there appeared to be no need to further examine the allegation of discrimination.

The arguments presented to the Ombudsman after his friendly solution proposal

33. In its reply, the Commission stated that, in its opinion of 25 September 2008, it gave the complainant the opportunity to request an arbitration procedure in order to obtain a second assessment of his medical condition. The complainant did not do so. The Commission nevertheless decided to reconsider the complainant's request for a reserved parking space. On 20 October 2009, the complainant was examined by Dr. D., who concluded that a reserved parking space should be granted to the complainant on medical grounds. The

Commission, therefore, decided to accept the Ombudsman's proposal for a friendly solution. It stated that the complainant would be granted a reserved parking space for the remaining two years of his career.

34. In a telephone conversation with the Ombudsman's services on 18 December 2009, the complainant's lawyer indicated that the complainant was fully satisfied with the outcome of the case, especially in view of the fact that he had been granted a reserved parking place until he retires.

The Ombudsman's assessment after his friendly solution proposal

35. The Ombudsman notes with satisfaction that the Commission accepted his friendly solution proposal and that, on medical grounds, the complainant was granted a reserved parking place. He further notes that the complainant confirmed that the friendly solution proposal was successful.

C. Conclusion

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

A friendly solution has been achieved between the complainant and the Commission.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 19 February 2010

[1] These criteria are set out in the note concerning "Allocation criteria of parking spaces" (OIB.9/RC) of 25 January 2007, drawn up by the Commission's Infrastructure and Logistics Office.

[2] In the French version of this note, this term is rendered by " *Peuvent bénéficier...* ".

[3] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data, OJ 2001 L 8, p. 1.

[4] OJ 2007 C 27, p. 21.

[5] OJ 2000 L 303, p. 16.

[6] Judgment of 17 July 2008 in Case C-303/06 *Coleman* , not yet published.

[7] Case C-316/97 P *Parliament v Gaspari* [1998] ECR I-7597.

[8] These are: (i) a certificate of disability emanating from a Member State, (ii) after three months of pregnancy, (iii) temporarily, for persons who have undergone a recent hip, ankle, knee or spinal column operation, (iv) obvious walking problems, and (v) very specific situations (for example morbid obesity).