

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 23 April 2018

JUDGEMENT IN CASE No. 84

Mr. AA
Applicant

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 84 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on 19 March 2018
At 10 a.m. in Château de la Muette,
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of :

Mrs. Louise OTIS, Chair

Mr. Luigi CONDORELLI

And Mr. Pierre-François RACINE

with Mr. Nicolas FERRE and Mr. David DRYSDALE providing Registry services.

The Tribunal heard:

Mr. Giovanni M. PALMIERI, counsel of the Applicant ;

Mr. Rémi CEBE, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General;

Mr. DD, Head of Human Resources Operations, witness called by the Secretary-General

INTRODUCTION

[1] In his application for annulment and compensation registered with the Registry on 23 March 2017, Mr AA (hereinafter referred to as "the Applicant"), asked for the decision of the Secretary General (hereinafter referred to as "the SG") of the Organisation for Economic Co-operation and Development (hereinafter referred to as "the Organisation") of 10 November 2016, considering the Applicant's failure to reply to a questionnaire concerning the management of the Organisation's medical insurance as a request to maintain his membership of the global medical and social system subject to the payment of a contribution provided for in Instruction 117/1.4.2(d)(ii), to be set aside and that monetary compensation be awarded to reimburse the costs incurred in these proceedings.

[2] The Applicant filed a memorandum on 28 June 2017.

[3] The President of the Administrative Tribunal issued a decision on the management of the proceedings and the investigation schedule on 11 August 2017.

[4] The Applicant submitted an additional amended written statement on 13 September 2017.

[5] The Organisation's SG issued his comments on 30 October 2017.

[6] The Applicant submitted a reply on 27 November 2017.

[7] The Organisation's SG submitted his comments in rejoinder on 8 January 2018.

THE FACTS IN THE CONTEXT OF THE DISPUTE

[8] Mr AA joined the Organisation in 1964 and, after more than 30 years of service, retired in 1996. He joined the Global OMESYS scheme in 1993 and confirmed his membership when he retired.

[9] On 4 December 2015, the Applicant received information from the Medical and Social Insurance Office that a number of amendments to Instruction 117/1.4.2 had been adopted and that, as a result, former officials who were members of the Global OMESYS scheme and wished to remain members would now have their contributions increased by 4.8% in the event that they enjoyed "*actual rights to medical cover under another social protection scheme*". A questionnaire to be completed and returned was subsequently sent to the Applicant, with the aim of verifying his exact situation, in particular as regards any rights to medical cover other than that provided by OMESYS.

[10] On 10 November 2016, the Applicant received a letter from the acting Chief HR Operations Department Officer asking him to complete this questionnaire and return it by 12 December at the latest. The following was added:

"Please note that your failure to reply or any incomplete reply will be considered as a request to maintain your Global OMESYS membership subject to payment of the 7.36% contribution provided for in Instruction 117/1.4.2 d) ii), and your personal situation with regard to medical cover will be updated accordingly".

[11] On 12 December 2016 the Applicant submitted a prior request to the Secretary General to obtain the withdrawal of what he considered to be an unlawful decision adversely affecting him: that of 10 November 2016 providing that the Applicant's failure to reply or incomplete reply to the above-mentioned questionnaire would be treated as a request to maintain his membership of the Global OMESYS system subject to payment of the increased contribution provided for in Instruction 117/1.4.2 (d) (ii): a higher contribution which, according to the Applicant, cannot be applied to him for a whole series of reasons which his various pleadings amply illustrate.

[12] Since this prior request had not been answered in substance within 30 days (apart from a generic circular letter of 10 January 2017 from the OECD Executive Director stating that requests such as the one from Mr AA were "*under examination*" and that a reply would come "*shortly*"), the Applicant - anxious to avoid any possibility of his right to initiate proceedings lapsing - considered that, silence being tantamount to refusal, the implied dismissal by the Organisation

should give rise to an application for annulment and compensation. The application was actually filed in time, on 28 February 2017.

[13] Almost two and a half months after the filing of his application (and five months after the notification of his prior request to withdraw the disputed decision of 10 December 2016) the Applicant received a registered letter dated 12 May 2017 from the Chief Human Resources Officer,

first, contesting that the letter of 10 November 2016 from the acting Chief HR Operations Department Officer could be seen as containing a decision adversely affecting Mr AA, when its "*... sole purpose was... to... request... information making it possible to examine whether your membership of OMESYS and the associated contribution rate corresponded to your personal situation*";

secondly, informing him that "*... on the basis of the information that the Human Resource Management Operations Department has been able to gather concerning your personal situation, the Organisation considers that you do not have any actual rights to medical cover under any social protection scheme other than OMESYS. It has therefore been decided to maintain your membership of Global OMESYS at the rate provided for in the Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, which is currently set at 2.5% of the reference salary in your case*".

[14] The decision of 12 May 2017 finally gives the Applicant the right to maintain his membership of Global OMESYS at the same rate of 2.5% (and not at an increased rate). It goes without saying that such a favourable decision, which eliminates the decision of 10 November 2016 which is the subject of Mr AA's application, cannot be contested by him since it does not adversely affect him at all, quite the contrary (a point on which the two parties to the proceedings agree). This is despite the fact that the decision of 12 May 2017 appears to be based on legal and factual arguments which the Applicant criticises as completely wrong, as expounded by Mr AA at some length in his series of pleadings after 12 May 2017, although there is clearly no

case for the Tribunal to judge in the present proceedings, given that the said decision of 12 May 2017 is not (and cannot be) contested by the Applicant.

[15] However, the termination of the cause of the dispute, resulting from the elimination of the contested decision and its replacement by a decision in favour of the Applicant, in no way implies that the application of Mr AA is considered inadmissible, as the SG asks the Tribunal to judge. It would only be inadmissible if - as the SG maintains - *the letter of 10 November 2016* could not be qualified as a "decision", being, it is argued, a mere request for information, or even if - while being a true "decision" - it did not include any grounds for a complaint by the Applicant. The reason for this is that, in accordance with Article 22(c) of the Regulations applicable to staff members and Article 3(a) of the Regulations of the Tribunal, the Tribunal may only take cognisance of decisions contested by serving and former officials; and according to the Applicant, this is precisely the case concerning the contested decision. Accordingly, the Applicant asks the Tribunal to declare its application admissible, and consequently invites it to decide that the legal costs it has had to incur (generated in particular by the complexity of the proceedings, by their interconnectedness with other proceedings relating to various Applicants who have delayed and procrastinated and by the extension of time limits to enable the Organisation to analyse the situation of all the former officials) be reimbursed by the Organisation.

CONTENTIOUS ISSUES: ADMISSIBILITY OF THE APPLICATION AND LEGAL COSTS

[16] It appears from the foregoing that only two contentious issues remain to be settled by the Tribunal: the first concerns the admissibility of the application, while the second concerns whether or not the Applicant is entitled to be reimbursed for the legal costs incurred by the present proceedings.

The question of the application's admissibility

[17] It was recalled that, in accordance with Article 22(c) of the Regulations applicable to officials and Article 3(a) of its own Regulations, the Tribunal may only take cognisance of decisions adversely affecting serving and former officials. However, as already pointed out, the

SG claims that the letter of 10 November 2016 from the Chief HR Operations Department Officer did not contain any decision adversely affecting Mr AA: hence his application for annulment and compensation was inadmissible and premature. According to the SG, this letter firstly urgently requested detailed information concerning the Applicant's personal situation and secondly merely announced future decisions which might undoubtedly have concerned him, but which had not in fact been taken: no current damage was therefore suffered by Mr AA, and he had no grounds for complaint.

[18] The Tribunal finds the arguments put forward by the SG unconvincing. While it is true that the document of 10 November 2016 emphatically repeats the request for information about the Applicant's personal situation, one should not underestimate the importance of the passage already mentioned according to which "*...your failure to reply or any incomplete reply will be considered as a request to maintain your Global OMESYS membership subject to payment of the 7.36% contribution provided for in Instruction 117/1.4.2 d) ii), and your personal situation with regard to medical cover will be updated accordingly*". There is no denying that these words do indeed have the appearance of "an administrative decision capable of being applied", the passage being "worded in prescriptive and comminatory terms, without any hypothetical nuance" (Memorandum of 28 June 2017 of the Applicant, paragraph 29). In other words, the document of 10 November 2016 expresses a real decision, namely that the failure to reply or an incomplete reply to the questionnaire by Mr AA within a precise deadline (12 December 2016) would inevitably have the consequence of maintaining "*your Global OMESYS membership subject to payment of the 7.36% contribution*". It goes without saying that the fact that the decision in question was not subsequently upheld does not change the fact that this was a decision adversely affecting him, since he was convinced that he was entitled to the 2.50% contribution (which, as we know, would subsequently be granted to him by the SG). It is therefore understandable that Mr AA was convinced in good faith that he should contest the 10 November decision "to defend his legitimate interests and avoid any possibility of his right to initiate proceedings lapsing" (Memorandum cited, same paragraph).

The question of legal costs

[19] It is on the basis of the inadmissibility of the application that the SG asks the Tribunal to dismiss all of Mr AA's claims, including the claim to be reimbursed for the legal costs incurred. On the contrary, having decided that the application is admissible, the Tribunal considers that the reimbursement of the legal costs is necessary in this case; the amount of this reimbursement should be fixed taking into account the Applicant's request (€3,750) as well as all the factors mentioned above (above, paragraphs 14 and 15).

CONCLUSION

[20] As a result of the foregoing, the Tribunal:

[21] DECIDES that Mr AA's application is admissible;

[22] NOTES the termination of the cause of the dispute, arising from the annulment of the contested decision and its replacement by a decision in the Applicant's favour;

[23] DECIDES that the Organisation shall reimburse the Applicant for the legal costs incurred and, taking into account all relevant factors, fixes the amount at €2,000.