



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF OHNEBERG v. AUSTRIA

(Application no. 10781/08)

JUDGMENT

STRASBOURG

18 September 2012

FINAL

11/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ohneberg v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President*,
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyeu,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 28 August 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 10781/08) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Wolfgang Ohneberg (“the applicant”), on 19 February 2008.

2. The applicant was represented by Mr W.L. Weh, a lawyer practising in Bregenz. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged a violation of Article 6 § 1 of the Convention because neither the Appeals Commission nor the Constitutional Court had held an oral hearing.

4. On 23 September 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1950 and lives in Hard.

6. The applicant worked for the Bregenz Tax Authority (*Finanzamt*) as a civil servant. He was the head of a tax assessment division (*Leiter der Veranlagungsabteilung*).

7. As the Austrian Tax Authorities were to be reformed, the applicant was removed from his post as head of the tax assessment division by a decision of the Bregenz Tax Authority of 29 March 2005. On 28 April 2005 the Tax Authority appointed the applicant to the post of specialist (*Fachexperte im Fachbereich*), a post that had a lower grade. Upon the applicant's appeal the Appeals Commission at the Federal Chancellery (*Berufungskommission beim Bundeskanzleramt* - "the Appeals Commission") set aside those two decisions on 28 July 2005.

8. By letter dated 24 November 2005 the Tax Authority sent the applicant the job profiles for both the post of head of division and the post of specialist.

9. The job profile for his former post as head of the tax assessment division stated that the applicant was responsible for, among other tasks, organising, coordinating and supervising the procedural requirements within the tax-assessment division, and dealing with case files in special circumstances. The applicant was also the supervisor of forty-three other civil servants and employees.

10. The job profile for the new post of specialist stated that, among other tasks, the applicant would assist the leading specialist (*Fachvorstand*), especially in the areas of coordination, quality check and supervisory measures. He would further participate in several working groups and deal autonomously and on his own initiative with legal remedies. He was not entitled to directly assign that task to someone else. He would also have to take decisions on questions of procedural and material law, give advice in difficult cases in his area of expertise (*Fachgebiet*), and represent the authority before the Independent Finance Panel (*Unabhängiger Finanzsenat*). The job profile did not state that any employees or civil servants were to be under his direct supervision.

11. On 27 April 2006 the Bregenz Tax Authority issued a decision by which the applicant was transferred to the post of specialist without any team-leading responsibilities. The applicant's new post was graded lower than his former post in the internal categorisation of public-service positions. However, with regard to a three-year moratorium provided by the law in the context of transfers involving downgrading due to re-organisation, the applicant would only be subject to a salary reduction after three years.

12. The applicant appealed against the decision to the Appeals Commission on 18 May 2006. He argued, *inter alia*, that his actual work had not changed sufficiently to justify the lower grade. Consequently the legal requirements for justifying a transfer to another post with a reduction

in salary had not been met. The applicant requested the Appeals Commission to hold an oral hearing.

13. On 21 July 2006, and without holding an oral hearing, the Appeals Commission dismissed the applicant's appeal. It held that the applicant's job profile had changed to a sufficient extent to qualify as a transfer to another post. Furthermore, the transfer had been strictly necessary in the interests of the service, specifically, the implementation of the overall reform of the Tax Authorities.

14. The applicant complained to the Constitutional Court, arguing, *inter alia*, that the transfer had been arbitrary and violated his civil rights, as his salary had decreased in the new position. He also complained that the Appeals Commission had failed to hold an oral hearing and requested the Constitutional Court to do so.

15. The Appeals Commission replied on 30 October 2006 and stated, referring to the Constitutional Court's case-law, that the rights and obligations arising from employment in public service did not amount to civil rights and obligations within the meaning of Article 6 of the Convention.

16. In his reply of 19 June 2007 the applicant argued that Article 6 of the Convention was applicable to his case and that the Constitutional Court was obliged to compensate the lack of an oral hearing before the Appeals Commission by holding one in the course of the complaint proceedings.

17. The Constitutional Court, without holding a hearing, dismissed the complaint on 11 July 2007, finding that none of the legal provisions on which the contested decision had been based was in violation of the Austrian Constitution. The decision was served on the applicant's counsel on 21 August 2007.

II. RELEVANT DOMESTIC LAW

18. Pursuant to section 41a § 6 of the Civil Servants Act (*Beamten-Dienstrechtsgesetz*) an appeal must be decided upon by the Appeals Commission at the Federal Chancellery.

19. The decisions of the Appeals Commission are not subject to an appeal to the Administrative Court. They are, however, subject to a complaint to the Constitutional Court.

20. Proceedings before the Appeals Commission are governed by the Code of General Administrative Procedure (*Allgemeines Verwaltungsverfahrensgesetz*), which provides in section 39 that administrative authorities can hold an oral hearing of their own motion or upon a motion by one of the parties in the course of the proceedings. As concerns oral hearings, section 40 § 1 further determines as follows:

“Oral hearings shall be held in the presence of all known parties and the necessary witnesses and experts. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

21. The applicant complained under Article 6 § 1 of the Convention that neither the Appeals Commission nor the Constitutional Court had held an oral hearing in the course of the proceedings concerning the transfer. Article 6 § 1, as far as relevant, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.”

A. Admissibility

22. The Government stated that in their opinion Article 6 of the Convention was not applicable to the present case. Firstly, referring to the case of *Pellegrin v. France*, a civil servant working in the financial administration of a government must be considered a “civil servant exercising specific public activities and acting as an agent of public authority responsible for protecting the general interests of the State or other public authorities” (see *Pellegrin v. France* [GC], no. 28541/95, ECHR 1999-VIII). The Government, taking note of the subsequent *Eskelinen* case (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II), further distinguished that case from the present case in that the present one only concerned a post transfer and thus was not an ordinary employment dispute. They further emphasised that the post transfer had only been executed on account of an extensive general reform of the government financial administration. Applying Article 6 to situations arising from such an administrative reform process would effectively make such a reform impossible in the future. Furthermore, the Government noted that the case in question did not involve proceedings concerning monetary disadvantage, but only the transfer itself. Finally, the Government stated that the *Eskelinen* case (cited above) would seem to allow for a member State to exclude groups of civil servants entirely from access to a court, which would lead to the undesirable result that, even though in some cases such civil servants would benefit from at least a number of the guarantees of Article 6, a member State might be forced to exclude them from access to a court altogether.

23. The applicant, referring to the *Eskelinen* case (cited above) and the *Stojakovic* case (*Stojakovic v. Austria*, no. 30003/02, 9 November 2006), asserted that Article 6 of the Convention was applicable to the present case.

24. The Court reiterates that it established in the *Eskelinen* case that there is a presumption that Article 6 applies to ordinary labour disputes between a civil servant and the State and that it will be for the respondent Government to show that a civil servant does not have a right of access to a court under national law and that this exclusion of the rights under Article 6 is justified (see *Vilho Eskelinen and Others*, cited above, § 62).

25. The Court is not convinced by the Government's argument that the dispute at hand was not a labour dispute and did not involve any monetary disadvantage. The appointment to a specific post is an essential criterion defining an employment relationship and the scope of work required from the employee. A second essential criterion is the salary attached to the post. A transfer to another post directly affects the job profile, which is one of the defining factors of the employment relationship. If such a transfer is accompanied by a salary adjustment, a second major defining factor of that relationship is involved. In the present case, the applicant was transferred to a post with a lower grade and was subject to a reduction in salary after a three-year moratorium (see paragraph 11 above). It follows, in the Court's view, that the dispute regarding the post transfer in the present case was in fact an ordinary labour dispute.

26. It is not contested that the applicant had access to a court (see paragraph 31 below). The Court further notes that the Government do not substantiate their claim that the exercise of the guarantees under Article 6, in particular the requirement of an oral hearing before a tribunal, would make administrative reform impossible in the future or would require the Government to exclude tax officers entirely from access to a court.

27. In line with its findings in the *Eskelinen* case (cited above), the Court therefore concludes that Article 6 of the Convention is applicable to the present case.

28. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

29. The applicant stated that he had explicitly requested an oral hearing before the Appeals Commission and before the Constitutional Court. He defined the question to be answered in the appeal proceedings as being how much the applicant's actual work had changed in the new post, which needed to be considered as a question regarding the facts and the law.

30. The Government contested that argument, claiming that the proceedings before the Appeals Commission and before the Constitutional Court had not included questions regarding the facts of the case or legal questions that could not be dealt with on the basis of the case file.

Furthermore, the domestic proceedings had been fair overall and the applicant had had sufficient opportunity to present his arguments in the course of the written proceedings.

31. In a comparable case the Court has already found that the Appeals Commission at the Federal Chancellery is to be regarded as a tribunal within the meaning of Article 6 § 1 (see, with further references to the characteristics of a “tribunal”, *Stojakovic*, cited above, §§ 46 et seq). Furthermore, the Court observes that the Constitutional Court, which dealt with the applicant’s case at last instance, did not have, in the circumstances, the required scope of review in order to constitute a “tribunal” within the meaning of Article 6 § 1 of the Convention (see *Stojakovic*, cited above, § 45 with a further reference to *Zumtobel v. Austria*, 21 September 1993, § 30, Series A no. 268-A). No appeal could be brought before the Administrative Court in the present proceedings.

32. Turning to the issue of the lack of a public oral hearing before the Appeals Commission, the Court notes that according to its established case-law an applicant is in principle entitled to a hearing before the first and only tribunal examining his case, unless there are exceptional circumstances which justify dispensing with such a hearing (see *Fredin v. Sweden (no. 2)*, 23 February 1994, § 21, Series A no. 283-A; *Fischer v. Austria*, 26 April 1995, § 44, Series A no. 312; and *Allan Jacobsson v. Sweden (no. 2)*, 19 February 1998, § 46, *Reports of Judgments and Decisions* 1998-I). The Court has accepted such exceptional circumstances in cases where the proceedings concerned exclusively legal or highly technical questions (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263; *Varela Assalino v. Portugal (dec.)*, no. 64336/01, 25 April 2002; and *Speil v. Austria (dec.)*, no. 42057/98, 5 September 2002).

33. The Court considers, however, that there were no such exceptional circumstances justifying dispensing with a hearing in the applicant’s case, especially in view of the factual questions raised in the course of the proceedings regarding the profile of the new post, and the ensuing legal issues.

34. There has accordingly been a violation of Article 6 § 1 of the Convention in respect of the applicant’s right to a hearing before the Appeals Commission.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

36. The applicant claimed 91,893.61 euros (EUR) in respect of pecuniary damage. He claimed to have suffered “burnout syndrome” and a slipped disc because of the post transfer and claimed medical costs in that regard. The applicant further claimed damages on account of early retirement in 2010, loss of monetary advantage due to lack of automatic advancement, and loss of future pension payments.

37. The Government contested these claims.

38. The Court reiterates that it cannot speculate what the outcome of the proceedings would have been if they had been in conformity with Article 6 of the Convention. Moreover, the Court cannot discern any causal link between the damage claimed and the violation found. Accordingly, it dismisses the applicant’s claims.

B. Costs and expenses

39. The applicant also claimed EUR 16,047.54, including value-added tax (VAT), for the costs and expenses incurred in the domestic proceedings, and EUR 9,024.84, including VAT, for those incurred before the Court.

40. The Government contested the claim in respect of the costs of the domestic proceedings and submitted that the claim for costs in connection with the proceedings before this Court was excessive.

41. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, as regards the costs claimed for the domestic proceedings, the applicant has not proved that specific costs were incurred in relation to the request for a public oral hearing and the complaint that no such hearing had taken place (see *Stojakovic*, cited above, § 62). Consequently, the Court dismisses the applicant claims in this connection.

42. As regards the costs and expenses incurred before the Court, it notes that the applicant, who was represented by counsel, did not benefit from legal aid. Making an assessment on an equitable basis, and in view of the awards made by the Court in a comparable case (see *Stojakovic*, cited above, § 63), the Court finds it reasonable to award EUR 3,500 under this

head, plus any tax that may be chargeable to the applicant. The amount includes VAT.

C. Default interest

43. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant's right to a hearing before the Appeals Commission;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,500 (three thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President