Decision in case 757/2017/NF on how the European External Action Service grants certain benefits to its staff having worked in an EU delegation in a non-EU country

Decision
Case 757/2017/NF - **Opened on** 01/06/2017 - **Decision on** 27/06/2019 - **Institution concerned** European External Action Service (No further inquiries justified) |

The case concerned the practice the European External Action Service (EEAS) has in place for granting certain benefits to staff members who are re-assigned to its headquarters in Brussels after having worked in an EU delegation in a non-EU country.

The complainant, an EEAS staff member who was transferred from a non-EU country to an EU delegation within the EU, considered that the EEAS was wrong not to grant him those benefits for the sole reason that his place of employment was not Brussels.

The Ombudsman found that the EEAS's approach to granting the benefits is reasonable in light of its mobility policy for staff. However, to improve the framework the EEAS has in place in this area, the Ombudsman makes three suggestions for improvement.

Background to the complaint

1. The European External Action Service (EEAS) is the EU's diplomatic service. It is responsible for managing the EU delegations to non-EU countries and international organisations around the world. [1] While most EU delegations are located in non-EU countries, four are located within the EU, namely in Paris, Strasbourg, Rome and Vienna.

2. The rights and obligations of EEAS staff are set out in the EU Staff Regulations [2] . EEAS staff are expected to rotate jobs every few years, moving between the EEAS headquarters in Brussels and the EU delegations. [3]

3. When EEAS staff work in an EU delegation in a non-EU country, they have a right to some additional benefits set out in the Staff Regulations [4] . One of these benefits is an education allowance to cover the actual education costs that staff have for the schooling of their children. [5]

4. EEAS staff who work within the EU do not, in principle, have a right to the additional benefits. Nevertheless, a staff member who previously worked in a non-EU country and who is temporarily re-assigned to the institution's headquarters or another place of employment within the EU may, under certain conditions and as a transitional measure, continue to receive the additional benefits. [6] Additional benefits granted on such a transitional basis are called 'retraining benefits' [7] .

5. The complainant is an EEAS staff member who had worked in an EU delegation in a non-EU country for a long period of time, partly for medical reasons. In the 2015 staff rotation exercise, the EEAS moved the complainant to an EU delegation within the EU. The complainant thus no longer had any right to the additional benefits attached to working in a non-EU country. The EEAS also took the view that he did not qualify for those benefits on a transitional basis. For the complainant, this meant that a large amount of education costs for the schooling of his child was not reimbursed by the EEAS.

6. The complainant made an administrative complaint against the EEAS's decision not to grant him retraining benefits. When the EEAS rejected the administrative complaint, the complainant turned to the Ombudsman.

The inquiry

7. The Ombudsman opened an inquiry into the complaint that the EEAS's decision not to grant the complainant retraining benefits [8] :

1) was based on an administrative practice that is arbitrary, discriminatory and unreasonable; and

2) failed to take into account the complainant's personal situation.

8. In the course of the inquiry, the Ombudsman received the EEAS's reply on the complaint. The Ombudsman's inquiry team also held a meeting with the EEAS to discuss the case and inspect a number of documents. The Ombudsman received the complainant's comments on the meeting report.

Retraining benefits and the EEAS's mobility policy

9. The provision on retraining benefits [9] reads as follows: " *Under the mobility procedure, an official assigned to a third country may, by decision of the Appointing Authority, be reassigned temporarily with his post to the seat of the institution or any other place of employment in the Union; such assignments, which shall not be preceded by a vacancy notice, may not be for more than four years. By way of derogation* [ ] *, the appointing authority may decide, on the basis of general implementing provisions, that the official shall remain subject to certain provisions of*

this Annex for the duration of this temporary assignment [ ] *.* " Among the provisions to which the staff member may remain subject, by way of derogation, is the one giving a right to an education allowance to cover actual education costs. [10]

10. In 2015, when the complainant was moved to a delegation within the EU, the EEAS decided on retraining benefits based on the European Commission's 1988 rules ("Modalités d'application" as amended in 1994 and 1997). [11] The EEAS did not have any general implementing provisions in place at the time.

11. According to the rules that applied in 2015, only staff who were assigned to the EEAS headquarters in Brussels were entitled to retraining benefits. Staff like the complainant, who were moved to a delegation within the EU, were not. [12]

12. Under the EEAS's mobility policy [13] , staff shall serve no more than two consecutive postings in an EU delegation (normally for four years each). After the second posting in a delegation, staff return to the headquarters in Brussels.

13. The EEAS argued that it applies the provision of the Staff Regulations on retraining benefits in light of its mobility policy. As a result, staff who return to the headquarters in Brussels after a second posting in a delegation, located in a non-EU country, and who agree to go back to a delegation in a non-EU country after a maximum of four years in Brussels, may be granted retraining benefits. [14] The complainant was not in that situation.

14. The EEAS argued that it had applied its rules and administrative practice on retraining benefits to the complainant's situation in a non-discriminatory manner. The complainant had not been *re-assigned with his post* but he had been *transferred* to a delegation within the EU. The transfer had been done in agreement with, and to the benefit of, the complainant, taking due account of his medical situation. Should the complainant object to a subsequent return to the headquarters, be it on medical or other grounds, the EEAS will consider the objections in the context of the 2019 staff rotation exercise.

15. The complainant's view that he was eligible for retraining benefits is based on the formulation of the relevant provision of the Staff Regulations, which states that retraining benefits may be given to staff re-assigned to the headquarters, as well as to staff re-assigned to " *any other place of employment in the Union* ". A delegation within the EU is a place of employment in the Union. The complainant thus argued that the EEAS's administrative practice to limit the retraining benefits to staff re-assigned to the headquarters was arbitrary and discriminatory. He also considered that this practice leads to an unreasonable outcome. Staff who are re-assigned to the headquarters can put their children in the European Schools for free and thus do not usually need the education allowance to cover actual education costs. On the other hand, staff working in a delegation within the EU may not have any other choice than to put their children in expensive international schools. The complainant also argued that the EEAS had failed to take proper account of his personal situation. Because of his health situation, he is committed to working in a non-EU country delegation after his posting at the delegation within the EU.

The Ombudsman's assessment

16. The wording of the relevant provision in the Staff Regulations would indeed allow the EEAS to have in place a policy that grants retraining benefits also to staff who are temporarily reassigned to a delegation within the EU after having served in a non-EU country.

17. However, the wording of that provision also makes it clear that the reassignment must be *temporary* , that is, that the staff member in question should then serve again in a non-EU country. [15] Under the EEAS's mobility policy, staff have to go back to the headquarters in Brussels after their second posting in an EU delegation. *Staff in their second posting will not, therefore, move on to serve in a non-EU country* . This means that staff who are in the complainant's situation have no right to retraining benefits during their second posting in a delegation, even if it is located " *in the Union* ".

18. The Ombudsman understands that the practical implications for staff like the complainant, who have no other option than to put their children in an international school with high fees, may seem unreasonable. However, irrespective of the EEAS's mobility policy, staff who serve their first posting in a delegation within the EU have no right to retraining benefits such as an education allowance to cover actual education costs. The same is true for staff who serve both their first and their second posting at delegations located within the EU. [16] Nevertheless, staff in those situations also need to guarantee the continuous education of their children, which may mean that they have no choice but to pay for international schooling. Given this context, the fact that the interaction between the EEAS's mobility policy and the provision on retraining benefits in the Staff Regulations means that no staff member serving in a delegation within the EU may get retraining benefits is reasonable.

19. The Ombudsman notes that the EEAS is legally required to put in place rules on retraining benefits in the form of general implementing provisions. The EEAS had not yet done so when deciding on the complainant's case. The EU Court has pointed to the EEAS's failure in this regard. [17] The Ombudsman understands that the EEAS and Commission are in the process of finalising joint general implementing provisions.

20. Irrespective of this shortcoming, the Ombudsman takes the view that the EEAS's interpretation of the provision on retraining benefits is reasonable in light of its mobility policy. The mobility policy itself is based on the EU legislature's choice that EEAS staff have a high degree of mobility.

21. The EEAS moreover acted in the complainant's interest when transferring him to a delegation within the EU, as it did so on medical grounds. However, this fact has no bearing on the right to retraining benefits. The Ombudsman understands the complainant's sense of uncertainty regarding his next posting. The EEAS's position that the complainant's medical situation must be reconsidered at the point in time when a decision is taken on his future place of employment is, however, justified from an administrative point of view.

22. Part of the Ombudsman's role is to identify opportunities for possible improvement in the EU administration. Based on the information obtained in this inquiry, the Ombudsman addresses a number of suggestions to the EEAS regarding the need to 'codify' its mobility policy and its administrative practice on retraining benefits as well as to ensure a consistent use of terminology in this context.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

No further inquiries are justified regarding the EEAS's rules on retraining benefits and its decision not to grant them to the complainant.

The complainant and the EEAS will be informed of this decision **.**

Suggestions for improvement

Unless the EEAS has done so in the meantime, the Ombudsman suggests that it:

- adopt general implementing provisions for the application of Annex X to the Staff Regulations;

- adopt a decision setting out its mobility policy with a view to complying with Article 6(10) of Council Decision 2010/427/EU; and that it

- ensure a consistent and appropriate use of terminology when referring to a staff member's change in place of employment (move, transfer, reassignment), given the legal consequences attached to the different situations.

Emily O'Reilly

European Ombudsman

Strasbourg, 27/06/2019

[1] A list of EU delegations is available here: https://eeas.europa.eu/headquarters/headquarters-homepage/area/geo_en [Link]

[2] Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501 [Link]

[3] Article 6(10) of Council Decision 2010/427/EU [Link] of 26 July 2010 establishing the organisation and

functioning of the European External Action Service provides that the High

Representative shall lay down the rules on mobility so as to ensure that the members of the staff of the

EEAS are subject to a high degree of mobility. It also provides that, in principle, all EEAS staff shall

periodically serve in EU delegations.

[4] Annex X to the Staff Regulations.

[5] Article 15 of Annex X to the Staff Regulations.

[6] Article 3 of Annex X to the Staff Regulations.

[7] Also known under the French term ‘recyclage’ benefits.

[8] Under Article 3 of Annex X to the Staff Regulations.

[9] Article 3 of Annex X to the Staff Regulations.

[10] Article 15 of Annex X to the Staff Regulations.

[11] Before the EEAS was set up, the European Commission managed delegations. In 2016, the EEAS and the Commission adopted a note setting out implementing measures for the granting of retraining benefits: Note of 22 September 2016 on ‘Retraining (recyclage) under Article 3 of Annex X to the Staff Regulations - Implementing measures’, co-signed by the EEAS and the Commission, Ares(2016)5503714 - 22/09/2016.

[12] The substance of the EEAS’s rules did not change as a result of the note adopted in 2016.

[13] Annual decision on rotation by the EEAS Director General for Budget and Administration, accompanied by the General Rules for the rotation exercise.

[14] Staff members who continue to stay at the headquarters after 4 years are no longer eligible for retraining benefits.

[15] *"[ ] an official assigned to a third country may [ ] be reassigned temporarily [ ]. [ ] such assignments [ ] may not be for more than four years. [ ]"*

[16] This is because they are not reassigned from a third country but move to their first posting after having been back at the headquarters in Brussels.

[17] Judgment of the General Court of 17 March 2016, *Eric Vanhalewyn v European External Action Service (EEAS)* , T-792/14 P [Link]; and judgment of the General Court of 13 April 2018, Ruben Alba Aguilera and Others v European External Action Service, T-119/17 [Link].