

## **Decision of the European Ombudsman on complaint 1033/99/JMA against the European Commission**

Decision

**Case 1033/99/JMA - Opened on 23/09/1999 - Decision on 14/06/2001**

Strasbourg, 14 June 2001

Dear Mr D.,

On 18 August 1999, you lodged a complaint with the European Ombudsman against the European Commission concerning the termination of your contract as an expert (Technical Assistant Correspondent) with the European Community Humanitarian Office (ECHO), which is part of the European Commission.

On 23 September 1999, I forwarded the complaint to the President of the European Commission. I received the Commission's opinion on 17 January 2000, and forwarded it to you with an invitation to make observations, which you sent on 28 February 2000. On 22 June 2000, I wrote to the President of the European Commission in order to seek a friendly solution to your complaint. The Commission replied on 11 October 2000 and I forwarded the reply to you for possible observations, which you sent on 10 November 2000. On 5 December 2000, I forwarded your observations to the Commission. The Commission replied on 29 January 2001. I forwarded the reply to you on 15 February 2001 and received your final observations on 15 March 2001.

I am writing now to let you know the result of the inquiries that have been made.

### **THE COMPLAINT**

According to the complainant, the facts were as follows:

The complainant began work as an expert for the European Community Humanitarian Office (ECHO), which is part of the Commission, in September 1997. From this date, he was employed as a consultant under four successive contracts. He was only asked to undertake a medical examination before the first contract. On that occasion, the complainant had disclosed to the Commission services his medical problems, in particular his poor heart condition, and the treatment which had been prescribed.



At the end of March 1999, the complainant informed ECHO that he wished to leave his current assignment in Colombia and that he was willing to move to Africa. In April 1999, ECHO offered him a position in Kinshasa (RDC), which he accepted.

On 30 June 1999, the complainant signed a new contract with ECHO. The following day, 1 July 1999, he underwent a medical examination, which was performed by Dr Geurts, from MEDICARE. The medical examination included an electrocardiogram analysis, which did not reveal any problem. The complainant informed Dr Geurts about his previous heart problems, and agreed to submit his latest echocardiogram which had been taken in Barcelona in February 1999 and which showed a complete recovery from his previous coronary condition.

By mistake, the complainant sent to Dr Geurts an earlier echocardiogram, which had been carried out in January 1999, immediately after he had suffered a coronary problem.

The complainant travelled to Kinshasa on 15 July 1999. The following day he received a telephone call from the Commission services in Brussels, requesting his immediate return. The complainant returned to Brussels on 20 July 1999, and was informed by ECHO that his contract had been annulled. This decision was formally notified to him by a letter from the Commission, which justified its action on medical grounds.

The complainant returned to Barcelona where he found a letter dated 9 July 1999 from Dr Geurts. The letter informed the complainant that, on the basis of the echocardiogram of January 1999 which he had submitted, Dr Geurts had concluded that the complainant's health condition was not adequate for the performance of his assigned tasks.

The complainant wrote to the Head of ECHO, Mr Alberto Navarro on 21 July 1999, to Dr Geurts on 22 July 1999 and to the Commission service responsible for aid to non-member states on 5 August 1999. His letters criticised the treatment he had received and requested a reconsideration of his medical condition in the light of his most recent medical tests. No reply was given to his request.

The complainant received an e-mail from the Commission service responsible for aid to non-member states dated 4 August 1999, which stated that the annulment of the contract for medical reasons was foreseen in the contract, and therefore he had no right to claim any compensation (Art. 22, General clauses of the contract).

On the basis of the above facts, the complainant alleged:

(i) that the Commission had abruptly ended his contract as an expert (Technical Assistant Correspondent) with ECHO on the basis of outdated medical tests, without notice or prior consultation and that by so doing, the Commission had not respected the rules of the contract, which stated that the contract could only take effect once the medical condition of the other party had been positively evaluated. The complainant also claimed that the institution should have known of his previous medical problems since he was already working for the institution.



(ii) the Commission had failed to reply to his letters about the matter.

## THE INQUIRY

### **The Commission's opinion**

The Commission explained that, as a general rule, medical examinations must be carried out prior to the signature of any contract. However, this rule cannot always be respected in case of missions involving urgent humanitarian aid. The contract, on the other hand, included a clause whereby the Commission could annul it if the medical condition of the contracting party renders him unsuitable for the assigned tasks.

In the present case, because of the urgency of the mission to be accomplished, the Commission recognised that it was not possible to proceed with the medical examination prior to the signature of the contract.

When the doctor in charge of the medical examination found that the complainant was not suited to perform the tasks prescribed in the contract, the responsible Commission services had no reason to question his conclusion, and were therefore compelled to terminate the contract. This decision should by no means preclude the complainant from seeking future contracts with the institution if his medical condition would evolve favourably.

As for the complainant's suggestion that the Commission should have carried out an additional medical examination before cancelling the contract, the institution did not consider it appropriate because of the short-term nature of the contract. The Commission added that its decisions in the context of a contract can always be contested by the other party before the competent jurisdiction.

The Commission recognised that not having had the medical opinion before the departure of the complainant was an unfortunate situation, and stated that it will seek to avoid similar cases in the future.

### **The complainant's observations**

In his observations, the complainant stated that the Commission had already agreed to post him to Africa well before the expiry of his former contract in Colombia, and therefore had ample time to perform a medical examination.

The complainant pointed out that the letter from Dr Geurts was dated 9 July 1999. Since the complainant was due to travel on 15 July 1999, the Commission, in the complainant's view, had not explained why it was not aware of the medical conclusions by then. He argued that the Commission should have allowed a new medical examination to be carried out, once he had explained the reasons which led to the mistaken medical conclusion. The Commission had not replied to his suggestion.

He repeated that the Commission did not respect the rules of the contract, which stated that it could only take effect once the medical condition of the other party had been positively evaluated.



Finally, the complainant stated that the Commission had refused to compensate him for the negative consequences resulting from its lack of diligence. He claimed to be entitled to such compensation.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

After careful evaluation of the opinion and observations, the Ombudsman did not consider that the Commission had responded adequately to the complainant's claims.

In the Ombudsman's view, the Commission could obviously not be held responsible for the fact that the complainant submitted the wrong echocardiogram. However, the negative consequences of that error could have been minimised or avoided if the medical examination had taken place earlier. The Commission signed the new contract on 30 June 1999 and arranged the medical examination for the following day. However, its services had already agreed informally to the complainant's request to move to a new post in Africa in April 1999. The medical examination therefore could have taken place before signature of the contract, if the Commission had acted more promptly. In this case, the complainant's error could have been discovered and corrected before the date scheduled for his departure to Africa.

The complainant claimed that he had suffered significant economic loss from the fact that he had already moved to Africa when the results of the medical examination became known. He also stated that the Commission had refused to compensate him. The Ombudsman therefore proposed by letter dated 22 June 2000 that the Commission reconsider its position and compensate the complainant for the loss he had suffered as a result of the situation.

In its reply of 11 October 2000, the Commission expressed its willingness to consider a potential compensation although subject to certain conditions, namely that such liability be established in accordance with the criteria set out for extra contractual liability in Art. 288 of the EC Treaty, as interpreted by the Community courts. The Commission added, however, that it did not consider it should bear any contractual liability in this case since its services had strictly complied with the terms of the contract. It recalled in support of its arguments, the relevant contractual clauses and the events that led to its decision to annul the contract.

The Ombudsman forwarded the Commission's reply to the complainant, who then provided the Ombudsman with details of the damage he claimed to have suffered (unexpected redundancy, sudden repatriation, loss of medical coverage, move back home), which, in his view, amounted to a total of 19.567,41 ₣.

The Ombudsman forwarded the complainant's assessment of his entitlement to compensation to the Commission. In reply, the Commission repeated its willingness to consider paying compensation, but only where its liability had been clearly established and not where its services had acted correctly within its contractual rights and obligations. The Commission



concluded by rejecting the complainant's claims for compensation.

On 12 March 2001, the complainant sent his observations. He considered that the Commission's reasoning was shameful, and criticised the suggestion made by the institution to have the dispute solved by a judicial instance because of the high costs of such course of action. In view of the available evidence, he concluded that it was now up to the Ombudsman to take a stand on the matter.

## THE DECISION

### 1 The termination of the complainant's contract with ECHO

1.1 The complainant alleged that the Commission abruptly ended his contract as an expert (Technical Assistant Correspondent) with ECHO on the basis of outdated medical tests, without notice or prior consultation. By so doing, the Commission had not respected the rules of the contract which stated that the contract could only take effect once the medical condition of the other party had been positively evaluated. Moreover, the complainant claimed that the institution should have known of his previous medical problems since he was already working for the institution.

1.2 The Commission explained that exceptionally in this case, it was not possible to proceed in due time with the medical examination prior to the signature of the contract, due to the urgency of the mission to be accomplished. It justified its action on the grounds that the contract included a clause whereby the Commission could annul the contract if the medical condition of the contracting party renders him unsuitable for the assigned tasks. The institution regretted that it could not receive the medical opinion before the departure of the complainant, although it undertook to seek to avoid similar situations in the future.

1.3 The Ombudsman notes that the Commission has not responded to the complainant's claim that it should have known of his previous medical problems since he was already working for the institution.

1.4 As regards the facts, it is undisputed that, following the medical examination, the complainant submitted an outdated echocardiogram to the responsible doctor. On the basis of the incorrect information, the doctor formed the view that the complainant was not fit to perform his assigned tasks.

1.5 Although the complainant was responsible for submitting the outdated echocardiogram, the Ombudsman considers that the negative consequences of his error could have been minimised or avoided if the medical examination had taken place earlier, or if the Commission had acted more promptly once the results were known. In either case, the complainant's error could have been discovered and corrected before the date scheduled for his departure to Africa.

1.6 The Ombudsman notes that the Commission's services had already agreed informally to the complainant's request to move to a new post in Africa in April 1999. The Ombudsman therefore cannot accept the Commission's claim that the urgency of the mission made it



impossible to carry out the medical examination before signature of the contract on 30 June 1999. The failure to carry out the medical examination before signature of the contract, as foreseen by Art. 6 of Annex I of the contract, was, therefore, an instance of maladministration.

## **2 The complainant's claim for compensation**

2.1 The complainant claimed to have suffered significant economic loss as a result of the Commission's actions. In accordance with his statutory duties (1), the Ombudsman sought to reach a friendly solution to the complaint. The Ombudsman regrets the failure of the Commission to put forward any constructive proposal in response to the complainant's assessment of the nature and amount of the loss that he had suffered.

2.2 In view of the fact that the Commission disputes the nature and amount of any liability to compensate the complainant and has refused to negotiate towards a possible friendly solution, the Ombudsman considers that the complainant's claim for compensation could best be dealt with by a court of competent jurisdiction, which would have the possibility to hear arguments concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact. The Ombudsman does not, therefore, consider that further inquiries into this claim are justified.

## **3. Reply to the letters of the complainant**

3.1 The complainant indicated that the Commission failed to reply to several of his letters to the institution dated 21 July 1999, and 5 August 1999. These letters made reference to the unfair treatment allegedly suffered, and requested a reconsideration of his medical condition in the light of his most recent medical tests. Although he received an e-mail from the Commission services dated 4 August 1999, this letter made no reference to the requests in his letters.

3.2 As the European Ombudsman has stated in similar cases, the Commission as a public administration has a duty to reply properly to correspondence from citizens.

3.3 The European Ombudsman notes, however, that in its opinion, the Commission has taken a stand on the substantive points raised by the complainant. No further inquiry by the Ombudsman in relation to this aspect of the complaint therefore seems necessary.

## **4. Conclusion**

On the basis of the European Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark:

The Ombudsman notes that the Commission's services had already agreed informally to the complainant's request to move to a new post in Africa in April 1999. The Ombudsman therefore cannot accept the Commission's claim that the urgency of the mission made it impossible to carry out the medical examination before signature of the contract on 30 June 1999. The failure to carry out the medical examination before signature of the contract, as foreseen by Art. 6 of Annex I of the contract was, therefore, an instance of maladministration.

The Commission disputes the nature and amount of any liability to compensate the complainant and has refused to negotiate towards a possible friendly solution.

The Ombudsman thus considers that the complainant's claim for compensation could best be



dealt with by a court of competent jurisdiction, which would have the possibility to hear arguments concerning the relevant national law and to evaluate conflicting evidence on any disputed issues of fact.

The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Art. 3 § 5 of the European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 1994, L 113/15.