

Decision of the European Ombudsman on complaint 1233/99/PB against the European Central Bank

Decision

Case 1233/99/PB - Opened on 29/10/1999 - Decision on 19/07/2001

Strasbourg, 19 July 2001

Dear Mr H.,

On 7 October 1999, you made a complaint to the European Ombudsman concerning your duties as a guard in an entrance-booth at the European Central Bank.

On 29 October, I forwarded the complaint to the President of the European Central Bank. The Bank sent its opinion on 26 January 2000. I forwarded it to you with an invitation to make observations, which you sent on 13 March 2000. I concluded that it was necessary to conduct further inquiries into your case, and therefore asked the Bank for further information on 19 October 2000. The Bank replied to my further inquiries on 29 November 2000, and I forwarded the reply to you with an invitation to make further observations, which you sent on 30 January 2001.

I also received a letter from a lawyer representing you, dated 17 January 2000.

On 19 March 2001, my services contacted you to ask for your view on a draft proposal for a friendly solution regarding one of your allegations against the European Central Bank. On 27 March you accepted my proposal for a friendly solution. I sent the proposal to the President on the European Central Bank on 17 April 2001, which I informed you about on that same date.

The European Central Bank sent its opinion on the proposed friendly solution on 31 May 2001, and I forwarded it to you for observations. You replied by letter of 23 June 2001.

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

THE COMPLAINT

The complaint concerned the following facts and procedures.

The complainant was employed by the European Central Bank ('the Bank') from 1 July 1998. In



July 1999, he was assigned to guard the entrance of the Bank's underground garage. The assignment involved full-time work in the entrance booth " *booth in-1* " (hereinafter 'the booth'). The Bank's official reason for placing the complainant on a full-time assignment in the booth was a wish to ensure accountability and reliability in the security duties relating to that particular entrance.

The complainant was dissatisfied with his new working conditions. He contacted his colleagues, who on 22 July 1999 wrote a letter of solidarity to the complainant's superiors. In their letter, they stated that a) the physical conditions in the booth were contrary to the standards that should apply in the Bank, and b) the new assignment had a discriminatory effect in that it reduced the complainant's shift-work duties (other guards continued doing shift-work, for which special shift-work payments are made). They also considered that the Bank had not given adequate justification for its decision to assign the complainant to the booth. They considered that a rotation system of several guards could ensure a satisfactory level of control.

On 23 July 1999 the Bank replied, sending its letter to the Staff Committee. The Bank stated that the physical working conditions in the booth would be improved (lighting, air-conditioning and temperature), and that the booth would be checked by the Bank's medical advisor. As for the working hours, the Bank stated that the complainant should work 4 days in the booth for a period of eight months, while awaiting changes to the Bank's security system. Once those changes had been introduced, the Bank would introduce a rotation system.

The complainant was informed in subsequent email correspondence that his working hours in the booth would be reduced. As he was not satisfied with the changes, the complainant wrote to his superiors on 5 August 1999 to express the view that:

- the physical working conditions did not comply with the German regulations on health and safety in work places, and
- a normal rotation system should be introduced to remove the discrimination between himself and his guard-colleagues

The complainant received a reply in a letter of 12 August 1999. The letter informed him that the Bank's Personnel Department had been advised that the work place [i.e. the booth] is not in violation of German regulations. The letter also stated that the Bank was awaiting tests of air quality in the booth, and that an air-conditioner would be fully installed after about one month. The letter concluded on this point by informing the complainant that his working conditions would be reviewed when the air-conditioning had been installed.

In regard to the alleged discrimination, the letter re-stated the original official reason for assigning main-responsibility of the booth to the complainant, i.e. the need to create a situation of accountability during the period necessary for the integration of this booth in the Bank's security infrastructure.

As regards the specific point of shift allowances (the reduction of which would lead to a lower end-salary for the complainant), the letter stated that shift allowances are given for inconveniences experienced. When such inconveniences are reduced, members of staff



cannot, in the Bank's view, demand that such changes should not affect them or their salary.

By letter of 26 August 1999, the complainant initiated a formal grievance procedure with a letter to the President of the Bank. The complainant restated his allegations, and added that he found the Bank's handling of the matter unduly slow (pointing out that six weeks would have passed between the time when the attention was drawn to the alleged problems, and the check by the Bank's medical advisor).

In two internal notes of 23 and 24 September 1999, the physical working conditions of the booth were described and evaluated by respectively the Bank's *Directorate Personnel* and the *Office Service & Security*. The note of 24 September contained information about the physical dimension of the booth, its cubic volume, as well as air-conditioning and temperature control. The note was classified as confidential. The note of 23 September contained a point-by-point evaluation of the complainant's allegations that the German regulations for health and safety were being breached. The conclusions in that note - which did not contain information about who had conducted the evaluation nor with what methods - either rejected the complainant's factual impressions or interpreted exceptions in the German regulations in favour of the Bank. The conclusions in the note of 23 September post-dated the instalment of a new air-conditioning system, for which reason it concluded that *"It is now no longer possible to ascertain whether the former system for the air circulation was compliant"*.

In a letter of 24 September 1999, the Bank's President replied to the complainant's formal grievance letter of 26 August (see above). The letter first stated that *"As a consequence of the particular status of the Bank as an European body located in Germany, [the Bank] is not bound to apply German standards for workplaces. Nevertheless, [the Bank] endeavours to comply with such regulations"*. The letter then stated that the *"the workplace in question at the time of the start of your assignment can be said to be essentially in compliance with the regulations"*.

As for the alleged discrimination, the letter re-stated the view that a full rotation system of guards was not feasible. The letter re-stated the view that the complainant's new assignment was required by security risks, and added that the management of the Office Service and Security Division was also of the opinion that the occupation of position by Bank security staff required software and hardware integration and the establishment of basic work routines, which would be more efficiently implemented by giving the responsibility to one specific guard.

On the issue of the complainant's reduced income due to less shift-work pay, the letter stated that shift pay is awarded as a kind of compensation for inconvenient working hours, and that a reduction of inconvenient working hours should be pursued whenever possible.

On the basis of the above events, the complainant submitted the following allegations to the Ombudsman:

- that he had been assigned to a workplace which did not comply with minimum standards according to German law
- discrimination, in that the assignment could be shared with other guards using a rotating system and the other guards are willing to do this, but the Bank had not accepted this possibility



- that the assignment involves a change in his contract which the Bank was not entitled to impose unilaterally
- undue delay by the Bank in dealing with his complaints about the matter
- that the Bank's decision in the grievance procedure did not clearly state what the arrangements for his work would be
- that the Bank's grievance procedure did not give him the opportunity to present his case orally to the decision-making authority.

THE INQUIRY

The Bank's opinion

The complaint was forwarded to the Bank, which submitted the following points and arguments.

The Bank first explained the general situation concerning the booth. In short, there are particular security problems at the place where the booth is located. One specific incident has given rise to concern, and refurbishment work in the building causes a heavier traffic of people through the entrance. The Bank has been in contact with the German Federal Criminal Authority which has recommended that the entrance should be included in the Bank's security system. Previously, the booth was only manned by security guards of firms that were engaged by the owner of the buildings.

The Bank then addressed the specific allegations:

- Although the Bank is not compelled by written law to comply with the German health and safety regulations, the Bank nevertheless endeavours to do so. A refurbishment has recently been carried out in the booth, and the Bank has in addition requested and received a report by a German health and safety inspector. The Bank received the report about two weeks before sending its opinion to the Ombudsman. (The report was not enclosed to the opinion - the Bank informed the Ombudsman that the report was being evaluated.)
- Various practical considerations gave rise to the Bank's view that the complainant should work as the main responsible guard for the booth instead of working in a rotation system.
- The Bank did not consider that it had altered the complainant's contract.
- The Bank concluded that no unjustifiable delays had taken place, referring to the quick decision to reduce the complainant's working hours in the booth and the steps that were taken to improve the physical working conditions.
- The Bank considered that it had adequately responded to the specific issues that the complainant had raised in the grievance procedure.
- The Bank appeared to consider that an *oral* hearing is not necessary to produce a reply to an internal complaint.

The complainant's observations

The complainant maintained his allegations, and enclosed a copy of the report produced by the German Health and Safety Inspector. The report was written on the basis of a visit which the Health Inspector made to the Bank on 14 December 1999.

In his report, the German Health Inspector first pointed out that his evaluation of the booth should not be considered final or comprehensive, given that his visit was only in the nature of a



short inspection of a confined part of the Bank's premises.

The findings in the Health Inspector's report were, in summary, that : 1) the air-conditioning of the booth was inadequate; 2) the working space was too small; 3) a wooden board between the two working spaces in the booth was dangerous; 4) electrical cables were lying around on the floor, and the desk-working space was too limited; 5) basic requirements of ergonomics and computer-work were not followed.

On the basis of his findings, the Health Inspector made specific and general recommendations regarding health and safety in the Bank. He added that it seemed relevant to adopt the suggested working methods set out in the German Law on Health and Safety at Work (*Arbeitsschutzgesetzes*). The Health Inspector pointed out that this legislation was implemented on the basis of EC Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work (1) .

In his observations, the complainant considered that the Bank should comply with German health and safety regulations and/or at least comply with those Community laws that the German legislation are meant to implement. The complainant pointed out that the Bank's conditions of employment contain a promise to apply and implement the EU social policy instruments.

The complainant also further developed his allegations that changes to his employment situation were based on inadequate reasons and constituted unjustifiable discrimination. He stated that, to the best of his knowledge, when his employment contract was concluded with the Bank, it was not communicated to him in writing that he had to work in shifts at all. He had worked in shifts nevertheless.

Further inquiries

After careful consideration of the Bank's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore wrote to the Bank, requesting it to provide him with the following information:

- The action, if any, that the Bank had taken, or intended to take, on the basis of the health and safety report by the German Health Inspector.
- Copies of the contract of employment between the European Central Bank and the complainant, including copies of the general conditions of employment

The Ombudsman also invited the Bank to comment on the complainant's observations.

The Bank's second opinion

In response to the Ombudsman's further inquiries, the President of the Bank replied that the Bank had made the following improvements to the booth:

- 1) The air-conditioning of the security booth had been linked into the air-conditioning system of the building and the air exchange rate had been optimised to a degree which complies with German standards; 2) An additional cooling system had been installed, which can be adjusted manually to personal preferences; 3) A sliding drawer together with a two-way intercom system had been installed so that practically all actions (deliveries, access and parking requests) can



be handled without opening the doors of the booth; 4) The booth had since 1 March 2000 been occupied by one security guard at the time only. The temporary wooden partitioning had been removed. The available free space was since 14 December 1999 in accordance with German standards.

The President of the Bank also pointed out that the EC social policy instruments are only relevant for the application and implementation of the Bank's Conditions of Employment and cannot be interpreted to go beyond the scope of these Conditions of Employment. The President stated that he is fully convinced that the work environment that the Bank offers its staff is generally of a very high standard.

In regard to the complainant's other allegations, the Bank essentially maintained its position.

The complainant's further observations

The complainant maintained his allegations, and stated that the attempts of the Bank to bring the entrance-booth into compliance with the German standards ought to be followed up by a second independent inspection.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The complainant's first allegation gave rise to a proposal for a friendly solution by the Ombudsman. The relevant facts and considerations were the following:

The complainant alleged that the entrance booth in which he worked did not comply with the standards for health and safety at work. He referred to the Bank's practice of complying, as far as possible, with the German health and safety standards.

The Ombudsman found that it was consistent with the Bank's practice on health and safety at work to commission the report from the German Inspector. The Ombudsman also considered that it would be consistent, and thus in accordance with good administration, to commission a second report to ensure that the improvements to the booth are in fact adequate. It appeared that the Bank has not commissioned a second report. The Ombudsman considered that the Bank's failure to commission a second report could constitute an instance of maladministration. He therefore proposed a friendly solution in accordance with Article 3 (5) of the Statute of the European Ombudsman, which directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant. The Ombudsman proposed that the Bank should commission a second inspection of the entrance-booth from the German authority that conducted the first inspection, to ensure that the improvements to the entrance-booth were adequate.

In its reply to the Ombudsman's proposal, the Bank informed the Ombudsman that it had commissioned a second inspection of the entrance booth. The Bank also addressed the main issues raised by the German inspector in his second report. It appeared from the Bank's reply that it was constructively considering the criticism in the inspection report.



In his observations, the complainant acknowledged that the Bank had accepted the Ombudsman's proposal to commission a second inspection of the entrance booth. However, he also appeared to consider that the Bank should have taken further steps to improve the booth. A friendly solution was therefore not possible in the present case, and the Ombudsman therefore reviews the matter together with the complainant's other allegations below.

THE DECISION

1 Non-compliance with the German health and safety standards

1.1 The complainant alleged that the entrance booth in which he worked did not comply with the standards for health and safety at work, a view which the Bank disputed.

1.2 Standards of health and safety in the Bank are currently not regulated in the Treaty or the Protocol on the Statute of the European System of Central Bank and the European Central Banks (2) . The Bank has nevertheless decided to establish a practice of following, as far as possible, the German health and safety standards. The Ombudsman welcomes this decision, and notes that the Bank has taken steps to act consistently with this practice by asking a German health and safety inspector to examine the entrance booth here concerned. However, the Ombudsman concluded that the Bank's failure to commission a second report, to ensure that the improvement were adequate, constituted a *prima facie* instance of maladministration. He therefore proposed a friendly solution in accordance with Article 3 (5) of the Statute of the European Ombudsman.

1.3 In its reply to the Ombudsman's proposal, the Bank informed the Ombudsman that it had commissioned a second inspection of the entrance booth. The Bank also addressed the main issues raised in the second report, and appeared to constructively consider the criticism that it contained. The complainant acknowledged that the Bank had accepted the Ombudsman's proposal to commission a second inspection, but considered that the Bank should have taken further steps to improve the booth. A friendly solution was therefore not possible.

1.4 The Ombudsman concludes that the Bank acted consistently with its practice of following German health and safety standards, by commissioning German inspection reports and constructively considering their criticism. It appears, therefore, that there is no maladministration on the part of the Bank in regard to this aspect of the complaint.

2 Discrimination regarding shift-work

2.1 The complainant has alleged that it was discriminatory of the Bank to assign him to a post without shift-work while other security guards continued to do shift work. The Bank has referred to practical considerations for its decision, in particular its wish to ensure a centralisation of the responsibility for the entrance-booth.

2.2 The principle of equal treatment implies that persons in similar situations shall be treated equally. In this case, the Bank exercised its powers of internal organisation to assign the complainant to a post which had particular characteristics. The Ombudsman does not consider that the complainant was in a similar position as his colleagues.



2.3 On the basis of the Ombudsman's inquiries into this aspect of the complaint, there appears to have been no maladministration by the Bank.

3 The alleged unilateral change in the employment contract

3.1 The complainant has alleged that the changes to his shift-work hours essentially constituted a change in his employment contract which the Bank was not entitled to impose. It appears to be implied in this allegation that the complainant has a right to work shift-hours. The Bank has rejected the allegation.

3.2 The Ombudsman does not consider that the complainant's employment contract contained a right as such to work in shifts. It therefore appears that there has been no maladministration by the Bank.

4 Undue delay by the Bank in dealing with his complaints

4.1 The complainant alleged that there was undue delay in the Bank's handling of his internal complaint. The Bank has rejected the allegation.

4.2 It shall first be recalled that the procedures in regard to which the undue delay is alleged concerned two issues, namely the health and safety standards of the entrance-booth as well as the question of changes to the complainant's shift-work duties.

4.3 In regard to the health and safety standards, the Ombudsman notes that the Bank made a number of attempts to independently assess the adequacy of the physical conditions of the booth. It is nevertheless apparent from the facts of the case that the matter was only dealt with effectively when the German Health and Safety Inspector was commissioned to produce a report on the conditions in the booth, i.e. approximately five months after the complainant had drawn the Bank's attention to the problems. However, in the light of the Ombudsman's attempt to seek a friendly solution, a formal finding of maladministration is here deemed unnecessary.

4.4 Regarding the issues not directly related to the health and safety conditions, the following facts are the relevant ones: The letter of solidarity was sent to the Bank's management on 22 July 1999. On 23 July 1999, the Bank replied. On 5 August 1999, the complainant sent another letter to the Bank, receiving a reply on 12 August 1999. On 26 August 1999, the complainant initiated a formal grievance procedure, and received a reply on 24 September 1999, i.e. less than a month later.

4.5 Without prejudice to the conclusions in paragraph 4.3 above, the Ombudsman does not consider that the Bank's responses to the letters from the complainant and his colleagues witness of undue delays. On the basis of the Ombudsman's inquiries into this aspect of the complaint, there appears to have been no maladministration by the Bank.

5 The alleged failure to clearly inform about the working arrangements

5.1 The complainant has alleged that the reply to his letter of 26 August 1999 did not clearly state what the arrangements for his work would be. The Bank has rejected the allegation, emphasising that the purpose of the response to the complainant's grievance letter was merely to address the specific grievances raised by the complainant.



5.2 The Ombudsman considers it to be a reasonable understanding of the grievance procedure that the aggrieved staff member shall normally receive a response merely to the specific grievances that he or she has raised. In so far as managerial consequences will be drawn from the outcome of the review, the staff member should, however, be duly informed. In the present case, the Ombudsman notes that the letter of 26 August 1999 (from the President of the Bank) stated that *"I have also asked the Directorate General Administration and Personnel to clarify your exact weekly assignments and the Directorate Personnel to inform the Staff Committee accordingly, so that any existing confusion is removed"* .

5.3 On the basis of the Ombudsman's inquiries into this aspect of the complaint, there appears to have been no maladministration by the Bank.

6 The failure to provide for an oral hearing

6.1 The complainant has alleged that it was maladministration that the Bank's grievance procedure did not give him the opportunity to present his case orally to the decision-making authority of the Bank. The Bank appears to consider that an oral hearing was not necessary.

6.2 In an administrative review of the kind here concerned, the individual in question must be given the opportunity to be heard through either a written or an oral procedure. In the present case, the issues concerned would not appear to have necessitated an oral hearing.

6.3 On the basis of the Ombudsman's inquiries into this aspect of the complaint, there appears to have been no maladministration by the Bank.

7 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to be no maladministration by the European Central Bank. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN

(1) OJ 1989 L 183/1 - (Internet reference
http://eur-lex.europa.eu/en/lif/dat/1989/en_389L0391.html [Link]).

(2) <http://www.ecb.eu/about/statescb.htm> [Link]