

Decision of the European Ombudsman on complaint 1464/99/(XD-LBD)IJH against the European Commission

Decision

Case 1464/99/LBD/IJH - Opened on 07/01/2000 - Decision on 22/05/2001

Strasbourg, 22 May 2001

Dear Mr S.,

On 25 November 1999, you made a complaint to the European Ombudsman concerning your previous work in the Cultural Co-operation Unit of the European Commission and your current situation in relation to that Unit.

On 7 January 2000, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 4 May 2000. On 22 May 2000, I requested further information from the Commission. On the same date, I informed you by letter of the action which I had taken, and enclosed a copy of the Commission's opinion. The Commission sent its reply to my request for further information on 7 July 2000. On 24 July 2000, I forwarded the Commission's reply to you, with an invitation to make observations on both the Commission's opinion and its reply to the request for further information. On 27 August 2000, you sent your observations.

On 4 April 2001, you wrote asking for the Ombudsman's conclusions on the case. On 20 April 2001, I wrote to you with an apology for the delay in dealing with your case and assured you that the case was being dealt with as a priority by my services.

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

I apologise again for the length of time that it has taken to deal with your complaint.

THE COMPLAINT

In summary, the facts according to the complainant are as follows:

The complainant worked in the Cultural Co-operation Unit of DG VIII of the Commission, in accordance with fixed term contracts between himself and the European Association for



Cooperation (EAC). His tasks concerned the programme "ACP cultural events in the EU Member States".

Following the end of his last EAC contract on 24 December 1997, the complainant continued providing services to the Commission until 7 April 1998. On that date, he was instructed to leave the Commission's premises because his presence was no longer covered by an EAC contract. Subsequent attempts to negotiate an amicable solution which would allow him to continue working at his previous tasks were unsuccessful.

In his complaint to the Ombudsman the complainant claims that the Commission should:

- (a) reclassify his EAC contracts as an indeterminate contract;
- (b) pay him for services which he had provided without an EAC contract from June 1994 to 1 November 1994; March 1996 to the end of May 1996 and January 1998 to April 1998;
- (c) integrate him into the Cultural Cooperation Unit of DG VIII;
- (d) authorise him to give interviews to the press in order to restore his reputation.

In order to help clarify the complainant's working situation, the Ombudsman asked the Commission also to comment on the complaint in the light of the Code of Conduct containing General Rules Governing Relations between Commission Departments and Certain Categories of Staff, which the Commission had adopted in October 1994.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission stated that the complainant's expertise had been made available to the Cultural Co-operation Unit of DG VIII in his capacity as a consultant to the European Association for Co-operation (EAC). Between 9 November 1994 and 24 December 1997, the complainant had four fixed term contracts with EAC:

- 9 November 1994 to 8 February 1996;
- 24 May 1996 to 23 February 1997;
- 25 February 1997 to 24 August 1997; and
- 25 August 1997 to 24 December 1997.

The Commission acknowledged that the complainant had continued to provide services to the Commission following the end of his last EAC contract.

As regards the complainant's claims, the Commission's opinion replied, in summary, as follows:



(a) Concerning the claim for reclassification of the complainant's contracts with EAC as an indeterminate contract, the Commission points out that a consultant under a service contract works independently, without any hierarchical relationship with the Commission services, but in close collaboration with the Head of Unit. As a result, the service contract is not an employment contract. It involves a commitment from a company or a consultant to provide, independently, certain well-defined services. Furthermore, service contracts are by definition for a fixed term. The Commission also pointed out that the service contracts in question were concluded between EAC and the complainant and not with the Commission. For these reasons, the Commission does not consider that the former contractual situation of the complainant could be reclassified as an indeterminate contract with the Commission.

(b) The Commission has no information on which to evaluate the claim for payment for services provided from June 1994 to 1 November 1994, and from March 1996 to the end of May 1996. The Commission is ready to consider the possibility of payment if the complainant can provide evidence.

(c) For the reasons given under (a) above and in the absence of any contractual link between the Commission and the complainant, the Commission cannot envisage the complainant's integration within the Cultural Co-operation Unit.

(d) The Commission cannot accept that the complainant gives press interviews because, according to the terms of his contract with EAC the complainant is bound by the obligation of discretion.

As regards the Code of Conduct, the Commission stated that, at the end of the first fixed term contract between the complainant and EAC, it asked the chairman of the exterior personnel group for an opinion as to the application of the three-year rule to the case. In reply, the chairman informed DG VIII on 30 April 1996 that the type of contract involved did not count in the application of the three-year rule.

Further inquiries

After consideration of the Commission's opinion, the Ombudsman considered that certain points needed to be clarified. He therefore asked the Commission to explain its relationship with the complainant between January and April 1998 given that the complainant had apparently signed financial documents on its behalf during that period. The Ombudsman also noted that the agreement between the Commission and the complainant specified that the latter should work "under the direct responsibility of the Head of Unit.". The Ombudsman asked the Commission to comment on this in the light of section III/C/3 (b) of its Code of Conduct.

The Commission's reply to the further inquiries

In its reply, the Commission made, in summary, the following points:

From the end of his last EAC contract to 7 April 1998, the complainant continued providing services for the Commission without any contract. The Commission is ready to consider the possibility of payment for those services.



The Commission had no contractual link with the complainant. The provision that the complainant would work "under the direct responsibility of the Head of Unit" means that the complainant reported directly to the Head of Unit, not that he was integrated in the official structure of the Unit. This should not be confused with the term "under the authority" which characterises an employment contract. Furthermore, the provision "under the direct responsibility of the Head of Unit" is not in breach of section III/C/3(b) of the 1994 Code of Conduct, according to which service providers may carry out planning tasks in the framework of defined projects, provided that they do not amount to the exercise of public authority.

The complainant's observations on the Commission's opinion and on its reply to the further inquiries

In his observations, the complainant referred to documents drawn up between June and November 1994 in which his hand written initials appear and to the names of Commission officials who could confirm that he was working for the Commission at that time. He also mentioned the address and the telephone number where he could be contacted in the Commission's premises at that time. As regards the period from March to the end of May 1996, the complainant referred to a letter dated 18 March 1996 from his Head of Unit to the organisers of a conference held in Bamako, Mali 28-30 March 1996, which states: *"I am sending you my collaborator, Mr S., to represent me and to take part to your work. You can contact Mr S. (Tel: 32.2/299.30.63 ...) to inform him about his trip and his stay."* As regards the period from January to the end of April 1998, the complainant noted that the Commission had recognised that he provided services during that period and is ready to consider the possibility of payment for them.

The complainant also stated that he had not carried out his work in the Commission independently. He was hierarchically linked to the Commission services for the following reasons: (i) the members of the Board of Directors of EAC were also his superiors inside the Commission; (ii) the Commission services gave him instructions as to his tasks; (iii) he provided services which could have been provided by the Commission's staff; (iv) he was not required to provide evidence of his independent status as is usually mentioned in the general conditions governing a service contract. According to the complainant, the service contract was a kind of "camouflage" for work which amounted to the exercise of public authority.

The complainant therefore insisted that his claim to be integrated into the Cultural Cooperation Unit is, justified.

The complainant's observations also underlined that the Commission should authorise him to give press interviews in order to restore his reputation.

THE DECISION

1 The claim that the complainant's contracts with EAC should be reclassified as an indeterminate contract

1.1 According to the complainant, he was hierarchically linked to the Commission services and did not work independently. He claims that his fixed term contracts with the EAC should be reclassified as an indeterminate contract.



1.2 In order to help clarify the complainant's working situation, the Ombudsman asked the Commission also to comment on the complaint in the light of the Code of Conduct containing General Rules Governing Relations between Commission Departments and Certain Categories of Staff, which the Commission had adopted in October 1994 and in particular section III/C/3 (b) thereof.

1.3 In its opinion, the Commission analysed the complainant's working situation as that of a consultant under a service contract, working independently without any hierarchical relationship with the Commission services, but in close collaboration with the Head of Unit. According to the Commission, a service contract is not an employment contract. It involves a commitment from a company or a consultant to provide, independently, certain well-defined services. Furthermore, service contracts are by definition for a fixed term. The Commission also pointed out that the service contracts in question were concluded between EAC and the complainant and not with the Commission. For these reasons, the Commission does not consider that the former contractual situation of the complainant could be reclassified as an indeterminate contract with the Commission.

1.4 As regards the Code of Conduct, the Commission stated that it complied with the three-year rule concerning the length of time worked on Commission premises, as well as with section III/C/3(b) of the Code, according to which service providers may carry out planning tasks in the framework of defined projects, provided that they do not amount to the exercise of public authority.

1.5 The Ombudsman notes that section III/C/3 (b) of the Code of Conduct containing General Rules Governing Relations between Commission Departments and Certain Categories of Staff also provides that *"... any confusion between the staff of service companies and the officials and temporary staff of the Institution must be avoided in order to prevent the inception of an employment relationship implying a master/servant link which could be regarded as constituting either an employment contract or a manpower supply contract"*. On the basis of the available evidence, the Ombudsman is not satisfied that the Commission has demonstrated its compliance with the above-quoted part of its Code of Conduct. However, for the reasons given in the following paragraph, the Ombudsman does not consider that it is justified to pursue further inquiries on this point in the context of the claim made by the complainant.

1.6 The Ombudsman also notes that the Court of Justice has stated that the EAC was set up under Belgian legislation as an international non-profit making association and was incorporated by royal decree. The Court therefore considered that it is for the national court to decide whether the EAC's formation and functioning comply with the criteria laid down by that legislation (1). The Ombudsman also considers that it would be for the national court to evaluate any claim that the complainant's contracts with EAC should be reclassified as an indeterminate contract of employment between himself and EAC.

1.7 Insofar as the complainant claims that he should have an indeterminate contract of employment with the Commission, the matter is dealt with in Section 3 of the decision below.



2 The claim to be paid for services provided to the Commission during certain periods

2.1 The complainant claims that the Commission should pay him for services which he provided without an EAC contract from June 1994 to 1 November 1994; March 1996 to the end of May 1996 and January 1998 to April 1998.

2.2 The Commission acknowledged that, from the end of his last EAC contract, the complainant continued providing services for the Commission and declared itself ready to consider the possibility of payment for those services. As regards the earlier periods, the Commission also stated that it is ready to consider the possibility of payment if the complainant can provide evidence.

2.3 In his observations, the complainant provided various elements to prove his work for the Commission during the two earlier periods for which he claimed payment. The Ombudsman forwards these elements to the Commission, together with a copy of the present decision.

2.4 The Ombudsman notes that the Commission has declared its willingness to pay the complainant for the work which he carried out without an EAC contract. The Ombudsman considers that it is for the Commission to define the legal basis on which it will pay the complainant and the basis of calculation of the appropriate amount.

2.5 There appears, therefore, to be no maladministration in relation to the Commission's handling of this claim.

3 The claim that the Commission should integrate the complainant into the Cultural Cooperation Unit of DG VIII

3.1 According to the complainant, his service contract with the EAC was a kind of "camouflage" for work which amounted to the exercise of public authority. He worked under the authority of the Commission and carried out his tasks in the same conditions as officials of the Commission. The complainant claimed that he should be integrated into the Cultural Cooperation Unit of DG VIII.

3.2 The Commission stated that it cannot envisage the complainant's integration into the Cultural Co-operation Unit. It explained its position on the basis of its analysis of the working situation of the complainant, discussed in section 1 above.

3.3 The Ombudsman recalls that a person may be appointed as an official or other servant of the Communities only in accordance with the rules and procedures laid down in the Staff Regulations, or in special legislation derogating therefrom.

3.4 The Ombudsman also notes that the Court of Justice has twice dealt with and rejected claims by members of staff of the European Association for Co-operation that the Association is a fictitious entity, their real employer being the Commission (2). Although the complainant's situation is different in that he was a consultant and not a member of the EAC's staff, the same principle could also apply to his case.

3.5 For the above reasons, the Ombudsman does not consider that the Commission's refusal to



accept the complainant's claim for integration into the Cultural Cooperation Unit of DG VIII is an instance of maladministration.

3.6 The Ombudsman notes, however, the established case-law that persons claiming the status of officials, or of employees other than local staff, may bring an action before the Court to contest a decision adversely affecting them. The complainant has the possibility, therefore, to therefore pursue his claim before the Court of First Instance.

4 The claim that the Commission should authorise the complainant to give interviews to the press

4.1 The complainant claims that the Commission should authorise him to give interviews to the press in order to restore his reputation.

4.2 In its opinion, the Commission stated that it cannot accept that the complainant gives press interviews because, according to the terms of his contract with the European Association for Cooperation (EAC), the complainant is bound by the obligation of discretion.

4.3 The Ombudsman recalls that, according to the Commission, it has never employed the complainant, whose contracts were with the EAC. The Ombudsman therefore understands the Commission's opinion to mean that it could neither waive, nor seek to enforce, the provisions of these contracts, to which it was not a party. In these circumstances, there is no real dispute between the complainant and the Commission, since it appears that the Commission does not claim any right to restrain the complainant from giving interviews to the press. No further inquiries by the Ombudsman are therefore necessary.

5 Conclusion

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

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

Yours sincerely,

Jacob SÖDERMAN

(1) Joined cases 87, 130/77, 22/83, 9 and 10/84, *Vittorio Salerno and others v Commission* [1985] ECR 2523.

(2) Joined cases 87, 130/77, 22/83, 9 and 10/84, *Vittorio Salerno and others v Commission* [1985] ECR 2523; Case C-286/83, *Albert Alexis and others v Commission* [1989] ECR 2445.