

Decision in case 171/2019/NH on how the European External Action Service dealt with a request for whistleblower protection and a recruitment procedure in an EU mission

Decision

Case 171/2019/NH - Opened on 14/02/2019 - Decision on 19/10/2020 - Institutions concerned European External Action Service (No maladministration found) | European External Action Service (Settled by the institution) | European External Action Service (No further inquiries justified) |

The complainant was a staff member in an EU civilian mission who reported what he considered to be corrupt practices at the European External Action Service (EEAS). He asked the EEAS to protect him as a whistleblower, but the EEAS did not reply. The complainant became concerned that the EEAS advertised his post and carried out the selection procedure as a measure of retaliation against him. He appealed against the outcome of the selection procedure but the EEAS did not reply.

In the course of the Ombudsman's inquiry, the EEAS replied to the complainant's appeal and his request for whistleblower protection.

The Ombudsman also inquired into the complainant's concern about retaliation and found no evidence of retaliation regarding the way in which the EEAS had carried out the selection procedure. She thus closed the case with a finding of no maladministration.

Background to the complaint

1. The complainant worked as a seconded national expert for the European External Action Service (EEAS) in an EU civilian mission. [1]
2. In late June 2018, the complainant became aware of what he considered to be corrupt practices in the EEAS headquarters. He informed his superiors about the matter and later learned that an investigation had taken place. [2]
3. In September 2018, the complainant's post was advertised in an "extraordinary call for contributions ". The EEAS uses calls for contributions to advertise job openings for seconded



national experts in its overseas operations.

4. Concerned that the EEAS may have advertised his post in retaliation for his allegations of corruption, the complainant asked his superiors to recognise him as a whistleblower and to give him protection in line with the EU Guidelines on Whistleblowing. [3] Despite several reminders, the complainant did not receive any reply to his request.

5. In October 2018, the complainant applied for the post advertised in the extraordinary call for contributions, that is, he re-applied for the post he was occupying. Since it was a seconded national expert position, the application procedure went through the national authorities. Following an administrative error by the national authority, the complainant's application was sent to the EEAS two days after the deadline and the EEAS first refused to accept it. Following an exchange with the national authorities, the EEAS later accepted the complainant's application and invited him to an interview. As a result, the complainant was not informed about the interview until one day before it was due to take place.

6. On 22 October 2018, the EEAS informed the complainant that he had not been selected for the post and that he would no longer be employed as of 31 October 2018.

7. The complainant submitted an appeal on the same day under the procedure set out in the rules on selection procedures for civilian missions. [4] In his appeal, the complainant argued that the selection procedure had been unfair and biased against him.

8. Having received no reply from the EEAS, the complainant turned to the European Ombudsman in January 2019.

The inquiry

9. The Ombudsman opened an inquiry into the following aspects of the complaint:

1) The failure by the EEAS to reply to the complainant's appeal of 22 October 2018 following his unsuccessful application;

2) The failure by the EEAS to reply to his request for protection as a whistleblower;

3) The way in which the EEAS handled the selection procedure for the complainant's post.

10. In the course of the inquiry, the Ombudsman received the reply of the EEAS to the complaint. The Ombudsman subsequently requested and obtained further information from the EEAS on the extraordinary call for contributions advertising the post occupied by the complainant. The Ombudsman also received the complainant's comments on the reply and on the further information provided by the EEAS. In order to get a full understanding of the facts of the case, the Ombudsman also inspected the EEAS's file on the issue.



The failure by the EEAS to reply to the complainant's appeal and to his request for whistleblower protection

Arguments presented to the Ombudsman

11. In the course of the inquiry, the EEAS replied that it had declared the complainant's appeal inadmissible. According to the applicable rules, a complaint concerning a selection procedure for seconded national experts should be submitted by the national authority, which had not been done in this case.

12. Regarding the request for whistleblowing protection, the complainant relied on a 2012 Commission document titled "EU Guidelines on Whistleblowing". The EEAS argued that this document was not applicable to staff members in civilian missions. The mission where the complainant worked had adopted its own "standard operating procedures" on whistleblower protection, which had been fully respected in the complainant's case. The EEAS said that the advertising of the complainant's post in the extraordinary call for contributions was not an act of retaliation, but a natural result of the reorganisation of the mission. The complainant himself initiated the reorganisation in January 2018. However, the EEAS acknowledged that it could have provided the complainant with more detailed written feedback on the action taken in response to the complainant's allegations of corruption.

The Ombudsman's assessment

13. In the course of the inquiry, the EEAS replied to the complainant's appeal and explained why it was inadmissible. The EEAS was correct in its finding that the complainant had not used the correct channel for his appeal under the rules on selection procedures for civilian missions. The Ombudsman thus finds that the EEAS has settled this aspect of the complaint.

14. In the course of the inquiry, the EEAS also replied to the complainant's request for whistleblower protection. The EEAS is right in that the EU Guidelines on Whistleblowers did not apply because they are applicable only to staff covered by the EU Staff Regulations. Seconded national experts in civilian missions are not covered by the Staff Regulations. The relevant rules are indeed the mission's standard operating procedures on whistleblowing. The Ombudsman finds that, in essence, the text of the EU Guidelines on Whistleblowers and of the mission's standard operating procedures is similar. Specifically, both documents lay down, in identical terms, that staff members who report an irregularity "*shall be protected against any acts of retaliation* ."

15. The complainant asked the EEAS to protect him as a whistleblower. In the course of the Ombudsman's inquiry, the EEAS replied to the complainant's request by explaining the applicable rules and stating that the advertising of the complainant's post in the extraordinary call for contributions was not an act of retaliation against which the complainant would need



protection. Since the EEAS has replied to the complainant's request for whistleblower protection and has explained the applicable rules as well as its position, the Ombudsman will not inquire further into this aspect of the complaint.

16. The Ombudsman trusts that the EEAS will take greater care in the future to provide swift replies to requests for whistleblowing protection of this nature. The substantive aspect of the complainant's request, that is, the question whether advertising the complainant's post was a retaliatory measure against him will be dealt with below in the assessment of how the EEAS handled the selection procedure.

The way in which the EEAS handled the selection procedure for the complainant's post

Arguments presented to the Ombudsman

17. The complainant put forward a number of arguments that, in his view, suggest that the selection procedure was organised by way of retaliation: The complainant had only one day to prepare for the interviews while other candidates had more time. He considers that this was unfair. Also, one of the persons he had named when reporting his corruption concerns in June 2018 was put in copy of e-mails concerning the selection procedure. The complainant is therefore concerned that there could have been a bias against him in the selection procedure. The complainant further argued that the EEAS accelerated the procedure by advertising his post earlier than foreseen in order to dismiss him because he had reported corruption concerns. The complainant acknowledged that he had been involved in the re-structuring of the mission, which meant that his post would be advertised again and that he would have to re-apply. He argued, however, that the call for contributions was initially scheduled for November 2018. Following his reporting of corruption concerns, the call was changed into an "extraordinary" call for contributions and advanced by two months.

18. The EEAS said that there was no link between the complainant's corruption allegations and his post being advertised. The selection procedure for the complainant's post was based solely on the selection criteria and the performance of the candidates. Because of their senior role in the EEAS, one person mentioned in the complainant's reporting of corruption concerns was put in copy of e-mails regarding the complainant's temporary redeployment (see paragraph below) and his late application to the selection procedure. However, the person in question did not take part in the selection procedure.

19. The EEAS further argued that it had not accelerated the extraordinary call for contributions for the post occupied by the complainant. The EEAS followed strictly all rules applicable to calls for contributions and selection procedures in EU missions. The unit in which the complainant worked had been restructured through a decision that entered into force on 1 July 2018. As of that date, the post occupied by the complainant no longer existed, as the job description had changed. This was why the EEAS had to advertise the post. As the complainant's post no



longer existed, there was no legal basis for continuing his secondment. The only way to keep the complainant with a new job description was to ask the national authorities for a temporary redeployment to the new post. According to the rules, a temporary deployment may last only four months. [5] This meant that the complainant's contract ended on 31 October 2018. The next scheduled call for contributions was planned for November 2018. With the complainant's contract ending, and another senior staff member recently having resigned, there was a risk that the newly created unit would remain without two senior staff members for some time. For this reason, the EEAS launched an extraordinary call for contributions, which included these two positions, along with four positions in other units.

The Ombudsman's assessment

20. EU institutions must take whistleblowing complaints seriously and must ensure that those making the complaints are protected against any form of retaliation. Doing so guarantees that the EU administration is truly accountable.

21. The Ombudsman's inquiry in this case does not deal with the substance of the concerns about corruption that the complainant reported. The inquiry focuses on whether the EEAS retaliated against the complainant through the launch of the extraordinary call for contributions and the way in which that selection procedure was handled.

22. Because the complainant did not use the appropriate channel for his appeal against the EEAS' decision not to recruit him, the Ombudsman cannot assess that decision as such. [6] However, there is no evidence in the complaint, nor in the documents inspected, that would suggest that the EEAS used the selection procedure as a measure of retaliation against the complainant.

23. In particular, regarding the complainant's argument that he had less time to prepare for interviews compared to other candidates, the Ombudsman notes that this was because the national authorities missed the deadline for submitting his application. The Ombudsman finds nothing to suggest that the EEAS deliberately informed the complainant late about the interview. In fact, the EEAS allowed the complainant to participate in the selection procedure despite the late application. This is an exceptional measure that clearly was in the complainant's favour.

24. Concerning the argument that one person named in the complainant's corruption concerns was put in copy of two exchanges of e-mails related to the selection procedure, the Ombudsman accepts the EEAS's explanation that the person in question did not have access to the complainant's application file and was not part of the selection panel. The first e-mail concerned the complainant's temporary redeployment, which was eventually accepted for the maximum duration allowed under the rules (see paragraph 18 above). The second e-mail related to the complainant's late application, which was also eventually accepted (see paragraph 22 above). The Ombudsman thus finds nothing to suggest that the person in question negatively influenced the outcome of the selection procedure or any other decision affecting the complainant.



25. The complainant does not challenge, as such, the EEAS's decision to advertise his post: he had been involved in the restructuring of the mission and had known already since January 2018 that his job description would change. What the complainant argues is that the EEAS advertised the post two months earlier than planned as a measure of retaliation for his whistleblowing.

26. However, having inspected all relevant documents related to the extraordinary call for contributions, the Ombudsman is satisfied that the EEAS did not accelerate the procedure as a retaliatory measure. The documents show that other circumstances, described in paragraph 18 above, justified the EEAS's decision to advance the call for contributions by two months. The EEAS's argument that the call was necessary to ensure business continuity is reasonable. EU case law says that the EU administration has a wide margin of discretion in how it organises its services and how it assigns staff members. [7]

27. In addition, the documents inspected show that the EEAS had to follow a number of strict rules regarding seconded national experts. In particular, the EEAS exhausted the maximum period of four months of "temporary redeployment" for the complainant. It thus kept him on the post for as long as it could following the restructuring and the change of job description. There is nothing to indicate that the EEAS sought to circumvent or misapply the rules and procedures applicable in this case.

28. Based on the above, there is nothing to suggest that the advertising of the complainant's post, or the timing of that advertisement, was a measure of retaliation against the complainant.

Conclusions

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

By replying to the complainant's appeal following his unsuccessful application, and by providing reasonable explanations as to why the appeal was inadmissible, the EEAS has settled this aspect of the complaint.

Since the EEAS has replied to the complainant's request for whistleblower protection and has explained the applicable rules as well as its position, the Ombudsman will not inquire further into this procedural aspect of the complaint.

The Ombudsman finds no evidence of maladministration by the EEAS in the way it handled the selection procedure in question. In particular, there is no evidence that the EEAS used the procedure as a retaliatory measure against the complainant.

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



Emily O'Reilly European Ombudsman

Strasbourg, 19/10/2020

[1] The European Union undertakes overseas operations in the form of “EU missions”, using civilian and military instruments in several countries in three continents (Europe, Africa and Asia), as part of its Common Security and Defence Policy.

[2] The European Anti-Fraud Office (OLAF) opened an investigation into the matter in late 2018.

[3] EU Guidelines on Whistleblowing, Commission Working Document SEC(2012) 679 of 6 December 2012, which state that “ *Members of staff who report serious irregularities in good faith must not under any circumstances be subject to retaliation for whistleblowing.* ”

[4] CivOpsCdr Instruction 5-2017 on Selection Procedures for Civilian CSDP Missions, paragraph 12. This document is not public.

[5] In line with section 3.7 of the CSDP Human Resources Handbook, which is a compendium of all HR rules applicable in EU military and civilian missions. This document is not public.

[6] The Statute of the European Ombudsman, in particular Article 2(8), limits the circumstances in which the Ombudsman may deal with complaints from EU staff members. The Ombudsman may not deal with such complaints until the staff member has exhausted all available internal complaint mechanisms.

[7] See judgment of the General Court of 27 November 2018, *Chantal Hebberecht v [Link] European External Action Service* , T-315/17, paragraph 27.