

Decision of the European Ombudsman on complaint 1056/2000/JMA against the European Agency for Safety and Health at Work

Decision

Case 1056/2000/JMA - Opened on 11/09/2000 - Decision on 26/11/2001

Strasbourg, 26 November 2001

Dear Mr G.,

On 31 August 2000, you lodged a complaint with the European Ombudsman against the European Agency for Safety and Health at Work (EASHW), in which you alleged that your classification as a local agent had not respected the local staff regulations.

On 11 September 2000, I forwarded the complaint to the Director of the Agency. I received the Spanish version of the Agency's opinion on 25 January 2001, which I sent to you on 14 February 2001 with an invitation to make observations. I received your observations on 19 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:

On 2 June 1998, the complainant was engaged as a local agent by the European Agency for Safety and Health at Work (EASHW) [henceforth, the Agency]. Article 3 of the contract established that the rules of the Commission's regulation governing the conditions of employment of its local agents in Spain [local staff regulation], should be applicable. These regulations provide in Article 4.II that the age of the local agent should be taken into account for his/her initial classification. The complainant alleged that the Agency had disregarded this criterion when deciding on his initial grade and step.

On 13 December 1999, the complainant submitted, jointly with other local agents, a note to Mr Konkolewsky, Director of the Agency, requesting the effective application of Article 4.II.a of the local staff regulation for the classification of its local staff and accordingly, the revision of the decisions already taken in this regard. In his reply to the complainant of 13 March 2000, the



Director of the Agency explained that age could not be taken into account for his initial classification since such practice would be contrary to the Spanish legal order.

The complainant then requested a meeting with the Agency's Resources Manager which was held on 27 March 2000. Since the Agency refused to modify its position, the complainant submitted an internal administrative appeal as laid down in the local staff regulations on 28 March 2000. On 17 April 2000, the Director of the Agency turned down the complainant's request. His note also made several considerations on the means of appeal available to local staff, and on a potential mediation by the European Ombudsman. Point 1 of the note reads as follows:

"1. I have been informed by the Resource Manager that during the meeting held on 27 March 2000 he didn't in any case suggest any conciliation by the European Ombudsman. On the contrary he firmly dissuaded you to follow this way as completely inappropriate in this case as any dispute between the Agency and its staff shall be dealt following the clear appeals procedure referred to article 29 and 31 of the rules applying to the employment conditions of local staff in service in Spain."

In summary, the complainant alleged that his classification as a local agent by the Agency did not respect the local staff regulation, in particular Article 4. II .a whereby the age of the agent should be taken into account when establishing his initial grade and step.

THE INQUIRY

The European Agency for Safety and Health at Work's opinion

The opinion first referred to the Agency's recruitment policy regarding local agents, as well as the applicable regulations. It explained that the Agency had been required to employ local agents since its budget establishment plan only foresaw a small number of C posts which were insufficient to meet the Agency's needs. The Agency argued that, in determining the conditions of employment of its local agents, its aims were to offer attractive conditions. For that purpose, it decided to apply the existing employment conditions of EU local staff in service in Spain, as laid down in the European Commission's regulation for local agents employed in its offices in Spain. These rules implemented Title IV (Arts. 79-81) of the Conditions of employment of other servants of the European Communities, which allow each institution to determine the conditions of employment of its local agents in accordance with current rules and practice in the place where the local staff perform their duties.

As regards the decisions of the Agency's appointing authority concerning the classification of local agents, the opinion explained that it did not consider it appropriate to take age into consideration since this practice would have been in conflict with the Spanish legal system. The Agency noted that the local staff regulation is subordinated to the Spanish legislation, in particular to the Spanish Statute of Workers, which enshrines the principle of equal treatment as one of its basic tenets. Accordingly, the application of different classification criteria on grounds of age would be discriminatory, and, as consistently held by Spanish courts, contrary to Spanish law. The Agency's opinion indicated that it should be borne in mind, that the Commission's



regulation on local staff is currently being reviewed.

The Agency also explained its position on the appeals made by the complainant, and in particular on his complaint to the Ombudsman. It noted that the complainant had submitted a claim without respecting the appeals procedure referred to in Articles 29 and 31 of the local staff regulation. Under this procedure he should have submitted a complaint to the Agency's Director, through his immediate superior and within three months of the classification decision. Even though the deadline for the exercise of this internal procedure had expired, the Director decided to reply to the complainant's appeal and explain to him the Agency's viewpoint regarding its local staff recruitment policy. He also suggested in the reply that the legal procedure to be followed, should the complainant decide to pursue the matter further, was to lodge an appeal before the competent Spanish Court as laid down in Article 31 of the local staff regulation.

The Director of the Agency underlined in the opinion that he had tried to deal with the matter in a constructive way, by informing the complainant of the proper legal course of action, namely the competent Spanish labour jurisdiction, to have the dispute solved. In his view, *"[.] for the Agency, there was no maladministration case to be dealt before your [the European Ombudsman] high instance"*.

The opinion concluded with some background information related to the relationship between the complainant and the Agency during the term of his employment. It also included a memorandum with a detailed legal analysis of the relevant Spanish labour legislation concerning discrimination on grounds of age.

The complainant's observations

In his observations, the complainant thanked the Ombudsman for his inquiry, and expressed his disagreement with the statements made in the Agency's opinion.

He firstly considered it irregular that the Agency had been employing local agents for tasks which were not suited for this type of staff. He also pointed out that the temporary nature of the contracts for local agents rendered them unwilling to confront their employer in case of disputes.

As regards the consideration of age for his initial classification, the complainant explained that the Agency had chosen to adopt the Commission's local staff regulation, which were annexed to each individual contract with a local agent. Whilst the Agency could have drafted its own regulation or modified the one from the Commission, it decided, however, not to do so. By acting in this fashion, the Agency, in the view of the complainant, had unilaterally breached its contractual obligations. He added that still today the Commission is applying its own regulation.

The complainant also rebutted the Agency's statements concerning his work performance. He considered that the negative assessment of his professional career by the Agency was aimed at diffusing the real problem.

THE DECISION

1. Admissibility of the case



1.1 In its opinion, the Agency stated that although the complainant had failed to respect the deadline for making an appeal under the appeals procedure referred to in Articles 29 and 31 of the local staff regulation it had replied to the complainant's appeal. As part of its reply, it advised the complainant to submit the dispute to the Spanish labour court. The Agency also informed the complainant that, in its view, it would be completely inappropriate for the complainant to address the European Ombudsman.

1.2 According to Article 2 (8) of the Statute of the Ombudsman, no complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all the possibilities for the submission of internal administrative requests and complaints have been exhausted by the person concerned. It was therefore necessary for the complainant to use the appeals procedure under the local staff regulation before submitting a complaint to the Ombudsman. Although the Agency argues that the complainant did not respect the deadline under the appeals procedure, it dealt with the complainant's appeal. The Ombudsman therefore considers that the complaint meets the requirement of admissibility laid down in Article 2 (8) of the Statute.

1.3 The Ombudsman considers that it was reasonable for the Agency to advise the complainant to submit the dispute to the Spanish labour court once the internal appeals procedure had been exhausted. However, the Ombudsman regrets that the Agency appears to have attempted to dissuade the complainant from exercising his right to complain to the Ombudsman and that it should have described the exercise of this right as "completely inappropriate".

2. Failure to respect the local staff regulation

2.1 The complainant alleged that the Agency did not respect Art. 4. II.a of the local staff regulation in deciding his classification as a local agent. Art. 4. II.a provides for the age of the agent to be taken into account when establishing the initial grade and step.

2.2 The Agency argues that the rules set out in the local staff regulation are subordinated to Spanish law. It also argues that Spanish law makes it unlawful to take age into account as a classification criterion.

2.3 The Ombudsman notes that the Agency adopted the Commission's local staff regulation governing the employment conditions of its local agents in Spain. It annexed the regulation, including Article 4.II a, to the complainant's contract.

2.4 Principles of good administration require the Agency to act lawfully and consistently. Before concluding its contract with the complainant, the Agency should have ensured that the contract was in accordance with Spanish labour law. By entering into a contract with the complainant and then denying him the benefit of one of its provisions, the Agency acted inconsistently. The Ombudsman therefore finds an instance of maladministration, and a critical remark will be addressed to the Agency.

2.5 The question of whether the complainant could enforce Art. 4. II.a of the local staff regulation against the Agency as a provision of his contract of employment could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility to hear the



arguments of the parties concerning the interpretation and application of Spanish law.

3. Conclusion

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

Principles of good administration require the Agency to act lawfully and consistently. Before concluding its contract with the complainant, the Agency should have ensured that the contract was in accordance with Spanish labour law. By entering into a contract with the complainant and then denying him the benefit of one of its provisions, the Agency acted inconsistently.

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The Director of the European Agency for Safety and Health at Work will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN