

Decision on how the European External Action Service (EEAS) dealt with the working relationship with an external expert who was employed through a contractor (case 147/2022/KT)

Decision

Case 147/2022/KT - Opened on 07/03/2022 - Decision on 13/12/2022 - Institutions concerned European External Action Service (No maladministration found) | European External Action Service (Maladministration found) |

The complainant, who used to work as an external IT expert for the European External Action Service (EEAS) through a contractor, was concerned that the EEAS had shown no flexibility and understanding with regard to his personal circumstances during the COVID-19 pandemic. He took issue with how the EEAS had dealt with his request to work remotely (or 'telework') outside his place of work, as well as with how it had informed him about the imminent termination of his employment contract.

The Ombudsman found nothing to suggest that the EEAS had improperly managed the working relationship with the complainant. However, the Ombudsman found that how the EEAS had informed the complainant that it had asked for him to be replaced amounted to maladministration.

Given the circumstances of the case, the Ombudsman considered that a recommendation would serve no useful purpose and closed the inquiry by making suggestions for improvement to the EEAS.

Background to the complaint

1. In July 2019, the complainant started to work for the European External Action Service (EEAS) as an external expert in the broader IT sector. He did so under an employment contract with a contractor to which the EEAS had awarded a framework contract for services.
2. In February 2020, the EEAS awarded the framework contract to a different contractor. The complainant continued working for the EEAS under an employment contract with the new contractor. According to the employment terms, the complainant had to work on-site at the EEAS premises in Brussels (Belgium).



3. In September 2020, after the COVID-19 pandemic broke out, the complainant asked the EEAS for permission to work remotely (or 'telework', according to the applicable rules in the EU institutions) in the capital of another EU Member State, which was his base and where he travelled regularly for personal reasons. He said that, as the Belgian authorities had classified that city as a 'red zone', in terms of epidemiological situation, he had to self-isolate every time he returned from there to Brussels. He thus wanted to avoid having to go through this restriction.

4. The EEAS rejected his request. In doing so, it also informed the complainant that it had in the meantime asked its contractor to replace the complainant because of poor performance. A few days later, the complainant quit his job.

5. In January 2022, the complainant turned to the Ombudsman. He complained that the EEAS had improperly managed the working relationship with him. He added that the EEAS had informed him that his performance was not satisfactory and that it had asked for his replacement through a public channel, its intranet, meaning this personal information was visible to others. He claimed compensation for how the EEAS had treated him and for unpaid working days.

The inquiry

6. The Ombudsman opened an inquiry into how the EEAS had managed the working relationship with the complainant, including how it had notified him that his contract would be terminated.

7. The Ombudsman received the EEAS's reply on the complaint and, subsequently, the comments of the complainant in response to the EEAS's reply.

How the EEAS handled the working relationship with the complainant

Arguments presented to the Ombudsman

8. The complainant contended that the criteria according to which the EEAS allowed staff to work from home were not clear. EEAS managers apparently granted permission to do so based on their discretion only. He claimed that, in general, the EEAS did not show any flexibility and understanding in regard to his personal circumstances and his request to work from home, and that this violated his freedom of movement.

9. The complainant added that, because of the EEAS's stance, he was forced to quit. He claimed compensation for how the EEAS had treated him and for unpaid working days.



10. The EEAS stated that the complainant was not directly employed by the EEAS, but was employed as an external service provider by a contractor. The specific contract applicable to the complainant's role required him to provide his services on-site, in Brussels, within the EEAS premises.

11. The EEAS added that, when the COVID-19 pandemic broke out in March 2020, the EEAS allowed external service providers to work from their homes in Belgium and, in exceptional circumstances (for example, for family or health reasons), from their home countries. The EEAS communicated the relevant 'teleworking rules' to its contractor (the complainant's employer). It also published them on an internal online platform, to which also the complainant had access. According to these rules, experts who wished to work from their home countries had to make a specific request for exceptional authorisation. Where such requests were approved, experts had to submit a detailed report on their activities daily.

12. The EEAS stated that, despite the above rules having been published, it discovered that the complainant had been teleworking from abroad, without having asked for prior authorisation to the EEAS or to its contractor. In addition, while teleworking, he did not report his daily activities on the on-line platform, as the rules required.

13. The EEAS further stated that, despite having discovered this, it chose not to ask its contractor to take measures against the complainant or terminate his employment contract. Instead, the EEAS asked the complainant to abide by the rules in future. In addition, the EEAS said that, when, in July 2020, the complainant made a formal request to work from outside his place of work, it approved the request.

14. As regards the complainant's claim about unpaid working days, the EEAS stated that it never makes payments directly to subcontractors but only to its direct contractors. Therefore, it was the contractor's obligation to pay the complainant for any unpaid working days. As far as the EEAS is concerned, it paid in full all the invoices submitted by the complainant's employer. Therefore, the EEAS could not be held responsible for any failure by its contractor to pay the complainant.

15. The EEAS added that it chose not to request any financial compensation for the complainant's poor performance and undelivered services, although it had the right to do so under the framework contract.

The Ombudsman's assessment

16. The Ombudsman finds that the documents provided by the EEAS in the course of the inquiry confirm its account of facts and support its arguments.

17. Indeed, under the EEAS's framework contract with its contractor, the complainant was, in principle, obliged to provide his services at the EEAS's premises in Brussels. In March 2020, the



EEAS published on its internal online platform, to which the complainant had access, rules on teleworking from home countries. According to those rules, experts who wished to work from their home countries had to make a specific request. Where such requests were approved, they also had to submit a detailed report on their activities daily.

18. The complainant also acknowledged in the context of the inquiry that, up until July 2020, he had not submitted a specific request to work from outside his place of work. In addition, when, in July 2020, that is, after the EEAS learnt that the complainant had been teleworking from abroad, the complainant submitted a formal request to telework from abroad, the EEAS approved it.

19. The documents consulted by the Ombudsman inquiry team also show that, up until end-June 2020, the complainant had not complied with the obligation to submit daily reports in support of the work he carried out from outside his place of work. Despite that, the EEAS gave the complainant the opportunity to submit the missing reports retroactively.

20. As such, the complainant's argument that the EEAS did not show any flexibility or understanding as regards his request to work from outside his place of work or that it violated his freedom of movement is not valid. Rather, the complainant failed to comply with clearly defined and reasonable requirements regarding 'teleworking' during the pandemic.

21. In any case, it is clear that, a month before the complainant submitted his most recent request to work from outside his place of work (in early September 2020), the EEAS had asked its contractor to replace the complainant. In doing so, it gave reasons related to the complainant's performance. There is nothing, in the documents consulted by the Ombudsman inquiry team, to suggest that the complainant's replacement is linked to his request to work from outside his place of work.

22. As regards the complainant's claim about unpaid working days, the EEAS is correct to state that, according to the contract, the contractor was responsible for paying the complainant. Documents consulted in the course of the inquiry show that the last invoice that the EEAS states to have paid to the contractor regarding the complainant comprises a payment for four days in September 2020. This number coincides with the date on which the complainant quit (4 September 2020).

23. In light of the above, the Ombudsman finds no indication of maladministration by the EEAS concerning this aspect of the complaint.

How the EEAS informed the complainant about the imminent termination of his employment contract

Arguments presented to the Ombudsman

24. The complainant contended that the EEAS chose a public channel, that is, its intranet, to



inform him that his performance was not satisfactory and that it had therefore asked for his replacement. By doing so, it divulged personal information on a platform that could be viewed by others.

25. The EEAS stated that it informed the complainant that it could not accept his request to telework from abroad, because it had in the meantime asked for his replacement, through “ *a restricted platform [...] on where specific access rights need to be obtained before the content becomes visible and accessible*” to “ *a restricted collaborative group* ”. It further stated that only the minimum details were communicated to the complainant through that shared platform.

The Ombudsman's assessment

26. It is clear from the documents in the case file that, in September 2020, the complainant posted on the EEAS's online platform a message in which, among other things, he asked the EEAS to allow him to work from abroad for the reasons explained above (see paragraph 3).

27. The EEAS replied on the platform two days later. It said that it could not accept the complainant's request because it had in the meantime asked its contractor to replace him due to his performance. The short message contained brief but explicit critical remarks about the complainant's performance over the past months. The EEAS informed the complainant that he would be contacted by his 'Service Delivery Manager' for the practical arrangements regarding the termination of his employment. Three other persons (apparently EEAS staff members) were copied in that message.

28. The Ombudsman notes that, regardless of the exact number of people who had access to the EEAS's “ *restricted* ” collaborative platform, it remains a fact that third persons, apart from the complainant, had access to the EEAS's message, even if under specific conditions. The EEAS does not contest this fact. On the contrary, in its reply, the EEAS admits that “ *it would have been more appropriate to only refuse [the complainant's] teleworking request, without mentioning any details about the decision to put an end to his mission as a service provider for [the EEAS' contractor]. [The EEAS's contractor] should have remained the sole interlocutor communicating the details of the end of mission directly to the complainant* ” [...] “ *It was then the responsibility of [the EEAS's contractor], as his employer, to inform the complainant about the termination of his mission at the EEAS.* ”

29. Given the sensitive nature of the information shared (the imminent termination of the complainant's employment due to poor performance), the Ombudsman considers that the EEAS ought to have communicated to the complainant such information *individually* , for example in a separate personal email. By failing to do so, the EEAS acted with maladministration.

30. However, the Ombudsman considers that, given the significant amount of time that has elapsed since the EEAS posted the above message and the fact that the complainant no longer works for the EEAS, a recommendation would serve no useful purpose in this case. The Ombudsman considers that the most appropriate step at this stage would be to make to the



EEAS some suggestions for improvement.

31. In particular, the Ombudsman suggests that the EEAS delete the above message from its online platform (in case it has not done so already or this has not in the meantime been done automatically) and to apologise to the complainant for having posted it. The EEAS should also take measures to prevent similar incidents in future.

Conclusion

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

There was no maladministration in how the European External Action Service (EEAS) managed its working relationship with the complainant.

How the EEAS informed the complainant about the imminent termination of his employment contract and the reasons for this constitutes maladministration.

Suggestions for improvement

In case it has not already done so, the EEAS should immediately remove from its online platform the message informing the complainant about the termination of his employment contract. It should also apologise in writing to the complainant for having posted the message on a platform that was visible to others.

The EEAS should take measures to prevent similar incidents in future.

The EEAS should inform the Ombudsman within three months of this decision of the action it has taken in response to these suggestions.

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

Emily O'Reilly European Ombudsman

Strasbourg, 13/12/2022