

Decision of the European Ombudsman on complaint 1325/2003/JMA against the European Commission

Decision

Case 1325/2003/JMA - Opened on 29/09/2003 - Decision on 06/10/2004

Strasbourg, 6 October 2004

Dear Mr D.,

On 14 July 2003, you lodged a complaint with the European Ombudsman, which you stated to be against the European Personnel Selection Office (EPSO). Your complaint concerns EPSO's decision not to admit you to the written examination of competition COM/A/3/02 because of your insufficient score, following the Selection Board's decision to annul a number of multiple-choice questions without decreasing the pass-mark accordingly.

On 23 June 2003, you had sent a previous complaint to the Ombudsman concerning the same subject matter (ref.: 1166/2003/GG) which was declared inadmissible on 8 July 2003.

On 29 September 2003, I forwarded your complaint to the Director of EPSO with a request for comments. Even though the request for an opinion was addressed to EPSO, the opinion on the complaint was sent by the Commission on 18 December 2003, as it appears that formally this competition was organised by the Commission. I have therefore treated your complaint as being against the Commission. I forwarded the Commission's opinion to you with an invitation to make observations. On 2 February 2004, you sent me your observations on the Commission's opinion.

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

THE COMPLAINT

The facts of the case are, in summary, as follows:

On 23 June 2003, the complainant had first lodged a complaint with the Ombudsman against the European Personnel Selection Office (EPSO). The complaint was registered under file number 1166/2003/GG. In his complaint, the complainant explained that on 20 March 2003, he took part in the pre-selection tests of open competition COM/A/3/02. The competition had been organised by the European Commission for the establishment of a reserve list of administrators



in the field of Research. From the four optional fields of the competition, the complainant chose "Sustainable development: environmental, energy and transport sciences and technologies". The selection criteria foresaw several successive stages. Candidates were required to pass three different pre-selections tests followed by a written examination and finally by an oral interview. The three pre-selection tests were organised simultaneously on 20 March 2003 and comprised a series of multiple-choice questions. Test A included 40 questions and was marked out of 40 (pass-mark 20); test B included 30 questions and was marked out of 40 (pass-mark: 20); and test C included 20 questions and was marked out of 20 (pass-mark: 10). The pass-mark was eliminatory.

It was foreseen that the 380 highest scoring candidates would be admitted to the next stage of the competition. This number was subsequently increased to 450.

On 23 April 2003, EPSO informed the complainant that he could not be admitted to next stage of the competition, since he had only obtained 19.487 points in pre-selection test A, and thus his score was below the minimum pass-mark. EPSO also stated that the competition's Selection Board [henceforth the Selection Board] had decided to annul one of the questions included in the test (question number 8) since its formulation appeared to be inaccurate. The total score of test A remained, however, unchanged. The value of each of the remaining questions was established by dividing their final number by the total score.

The complainant argued that the above score redistribution was arbitrary and unfair. In his view, the decision of the Selection Board to retroactively annul one question had a potential negative effect on those candidates who might have answered that question correctly. It also discriminated against those who were knowledgeable on the subject dealt with by the question. Secondly, the inaccuracies concerning the annulled question were due to reasons unknown to the candidates. And thirdly, the redistribution of score made by the Selection Board led to changes in the pass-mark. As a result of that operation, the pass-mark did not represent 50 % of the questions answered correctly, but rather a higher percentage, namely 51,3 % of the correct answers.

The complainant stressed that the method of redistribution defined by the Selection Board had been particularly negative in his case. He pointed out that the annulled question should have been either evaluated as correctly answered for all candidates or otherwise annulled, and in addition, the pass-mark ought to have been lowered accordingly.

On 6 May 2003, he asked the Selection Board to reconsider its position. In its reply of 28 May 2003, EPSO -on behalf of the Chairman of the Selection Board- confirmed the Board's decision on the grounds that it followed the text of the notice of competition.

On 10 June 2003, the complainant wrote to EPSO again to clarify the basis for his complaint, and to explain his point of view. EPSO's reply dated 12 June 2003 confirmed its previous position.

The complainant noted that the pre-selection tests were so selective that the number of



successful candidates was even below the 450 foreseen in the notice of competition. In the light of this fact, he concluded that if the Selection Board had followed a different criterion to weigh up the remaining valid questions of test A, it is likely that he would have been admitted to the next stage of the competition.

On the basis of the information submitted by the complainant, the Ombudsman considered that there were no grounds to pursue an inquiry and decided to declare the complaint inadmissible on 8 July 2003. The Ombudsman pointed out in his letter to the complainant that he had already considered a similar situation in his inquiry on complaint 904/99/GG. The Ombudsman's decision on that complaint dated 1 March 2000 concluded that the Commission's approach did not appear to constitute maladministration.

On 14 July 2003, the complainant wrote to the Ombudsman explaining that his allegation was not related to the legal points raised in the Ombudsman's decision in case 904/99/GG. His point of contention, instead, concerned the level of the pass-mark. He believed that the redistribution of score carried out by the Selection Board without a parallel decrease in the pass-mark, penalised him, and thus infringed the principle of equal treatment.

Taking into consideration the new evidence, the Ombudsman decided to register the complainant's letter as a new complaint (reference 1325/2003/JMA), and started an inquiry.

In summary, the complainant alleged that the Selection Board's decision to annul a question without lowering the pass-mark accordingly was arbitrary and unfair. He therefore claimed that all candidates who obtained a score corresponding to 50% of correct answers following the application of the weighting factor should be admitted to the written examinations.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first described the factual background to the case.

As regards the decision of the Selection Board to annul a question from test A of the competition, the institution pointed out that the Selection Board had noted an error concerning question 8, once the tests had already taken place. It decided to annul the question for all candidates in order to comply with the principle of equal treatment.

Since the question had been annulled, the points allotted to that test were redistributed over the remaining questions. The value of each remaining question was calculated by dividing the number of points indicated in the notice of competition by the final number of valid questions. By increasing the value of each correct answer in this way, the Selection Board did not take points away from any candidate. Selection boards are bound by the text of the notice of the competition and thus have no authority to change the test/examination pass-marks.

The Commission stressed that it is the exclusive responsibility of the selection boards to determine the arrangements and detailed content of the tests and examinations, in accordance



with the purposes of the competition. As regards the pre-selection tests, it is thus within the selection board's remit to determine the number of questions for each test provided for in the notice of competition. This number does not need to be equivalent to the number of points specified in the notice of competition, each question having the same value.

The purpose of the decision to annul a question was to objectively assess the candidates' personal merits and to preclude any unequal treatment arising from an evaluation on the basis of criteria, which were not strictly identical. The Commission noted that the legality of such a decision has been endorsed by the Community courts.

In the institution's view, the Selection Board's decision to annul a question was made in use of its discretionary power, and by no means breached the equal treatment principle. The adverse effect of the decision on a candidate is one of the consequences of the nature of the competition and the candidate's performance, but does not mean that the candidate suffered unequal treatment.

It was noted that to annul a question constitutes a proportionate response to the discovery of an error, and does not constitute an illegal action, which may render the whole procedure null and void, or give rise to liability.

In response to the complainant's suggestion that the pass-mark should have been modified, the institution pointed out that the pass-mark was stipulated in section B.I of the notice of competition and could not be altered by the Selection Board, which is required to comply with the terms of the notice.

The Commission added that to be admitted to the written test, candidates did not only have to obtain the pass-mark in each of the three tests, but also be among those obtaining the 450 highest scores. Even if the complainant had achieved the pass-mark for this test, it does not necessarily follow that he would have been among the candidates who obtained the highest scores for the three tests combined.

The institution explained that the decision to annul one of the questions cannot depend on whether the expected number of candidates attained the pass-mark. Failure to reach this mark does not mean that selection boards are empowered to depart from the notice of competition. The Selection Board thus acted within its remit and discretionary powers. Since the pass-marks could not be changed, a decision by the Selection Board which had the effect of increasing the number of candidates allowed to proceed in the competition would have constituted an irregularity of a nature to vitiate the competition.

The Commission concluded by stating that the Selection Board remained within the limits of its discretionary powers, and committed no fault which might have given rise to any liability.

The complainant's observations

In his observations on the Commission's opinion, the complainant repeated the allegations made in his complaint.



He underlined, however, that the object of his complaint was not the annulment of one question, or the application of a weighting factor. His primary allegation, instead, was that, although he had obtained a score corresponding to 50 % of correct answers in test A, once the weighting factor was applied, the Selection Board concluded that he had failed the test, and thus he had unfairly been excluded from the competition.

The complainant noted that the redistribution of the score following the annulment of one or more questions would respect, in principle, the principle of equal treatment, except in two circumstances both of which concurred in his case: (i) when the pre-selection tests are so selective that the number of successful candidates is lower than the number initially expected; and (ii) when a candidate obtains a score corresponding to 50% of questions answered correctly after the application of the weighting factor.

The complainant explained that by dividing the total score by the number of remaining questions, the Selection Board ended up modifying the individual scoring. Even though the initial pass-mark of 20 corresponded to 50% of questions answered correctly, after the score's redistribution decided by the Selection Board, the pass-mark was set to a higher level, namely to 51.3% of the correct answers. He therefore considered that the rules set out in the notice of competition had, in fact, been modified.

The complainant concluded by stating that he had been unduly penalised by the Selection Board's decision, which had indeed breached the principle of equal treatment.

THE DECISION

1 Alleged failure by the Selection Board to modify the pass-mark for Test A

1.1 The complainant alleges that the Selection Board's decision to annul a question of test A without lowering the pass-mark accordingly was arbitrary and unfair. He therefore claims that all candidates who obtained a score corresponding to 50% of correct answers following the application of the weighting factor should be admitted to the next stage of the competition.

The complainant notes that by dividing the total score by the number of remaining questions, the Selection Board had modified the individual scoring. Following this redistribution, the pass-mark corresponded to 51.3 % of the valid answers. His exclusion from the competition, despite the fact that he obtained a score corresponding to 50 % of the correct answers in test A, was unfair.

1.2 The Commission argues that the Selection Board decided to annul an erroneous question of the test in order to comply with the principle of equal treatment. It was within the Selection Board's remit to set the number of questions in each test provided for in the notice of competition, since it falls under its exclusive responsibility to determine the arrangements and detailed content of the tests and examinations, in accordance with the purposes of the competition.

The decision to annul one of the questions had the effect of redistributing the total number of



points allocated to that test over the remaining questions. By increasing the value of each correct answer in this way, the Selection Board did not take points away from any candidate. The adverse effect of the annulment on a candidate does not mean that any candidate suffered unequal treatment.

As regards the complainant's request to have the pass-mark for that test lowered, the Commission explains that selection boards are bound by the text of the notice of competition and thus have no authority to change the test/examination's pass-marks.

1.3 From the information submitted in the course of the inquiry, it appears undisputed that one of the questions included in test A of the competition was vitiated by an error. The Selection Board therefore annulled the question concerned and redistributed the total number of points among the remaining questions.

The Ombudsman notes that it is established case law that in the definition of the arrangements for an open competition, selection boards have a considerable margin of discretion. Under current Community case law, the arrangements for the conduct of a test fall under the discretionary power of selection boards, except to the extent necessary to ensure that the candidates are treated equally and that the choice made from among them is objective (1) . Furthermore, and in the specific case involving the decision to retroactively annul certain questions of a competition, the Court of First Instance has held that this practice does not constitute a breach of the principle of equal treatment (2) .

The Ombudsman finds that no information has been furnished in the course of his inquiry which may lead him to believe that the decision of the Selection Board to annul a question and to redistribute the total score among the remaining questions was biased or may have discriminated against certain candidates.

1.4 The Ombudsman recalls that the complainant does not dispute the power of the Selection Board to annul a question of the test, but rather he has argued that this decision should have been followed by the lowering of the pass-mark.

In view of the information available in the course of the Ombudsman's inquiry, it appears that the marking of the different tests of the competition was laid out in Section B of the notice of competition (3) . The marking of test A was set out in Section B. 1 (a) as follows:

" 1. Preselection tests - Marking (a) A test comprising a series of multiple-choice questions to assess your knowledge of Community research and development policy as well as your knowledge relating to the field chosen [...]. This test will be marked out of 40 (pass-mark: 20)."

1.5 According to the Staff Regulations (Annex III), the basic function of the notice of competition is to give those interested the most accurate information possible. As the Community courts have constantly held, notwithstanding their discretionary power, selection boards are bound by the wording of the notice of competition as published, and cannot depart from it (4) .



1.6 The Ombudsman acknowledges that, by increasing the score attributed to each of the remaining questions and, at the same time, having to maintain the initial pass-mark, the Selection Board made it more difficult to pass the test, since candidates were required to successfully reply to more than 50 % of all the questions. The Ombudsman notes, however, that whereas the notice of the competition explicitly referred to the number of points which candidates had to obtain to pass each test, the document made no reference to the number of questions which test A ought to have included. The notice of the competition, on the other hand, set the pass-mark of the test at an exact figure of 20 points, and did not include any reference to any percentage of valid answers.

In view of the case law mentioned in paragraph 1.3 above, the Ombudsman finds that the Selection Board had no room for discretion to modify the number of points which candidates had to obtain to pass the test. The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case.

2 Reconsideration of candidates to be admitted to the written examinations

2.1 The complainant claims that all candidates who obtained a score corresponding to 50% of valid answers following the application of the weighting factor should be admitted to the next stage of the competition.

2.2 In view of the conclusions reached above, the Ombudsman does not consider that there is any basis to sustain the complainant's claim.

3 Conclusion

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

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) See case T-132/89 *Gallone v. Council* [1990] ECR II-549, par. 27; case T-27/92 *Camera-Lampitelli and others v Commission* [1993] ECR II-873, par. 45; case T-153/95 *Kaps v Court of Justice* [1996] ECR-SC I-A-233 and II-663, par. 37; and case C-254/95 *Parliament v Innamorati* [1996] ECR I-3423, par. 33.

(2) Case T-189/99 *Ioannis Gerochristos v. Commission* [2001] ECR SC I-A-11, pp. 25-26.

(3) OJ C 177 A, 25.7.2003, p. 28.

(4) Case T-158/89 *Guido van Hecken v Economic and Social Committee* [1991] ECR-II-01341, par. 23.