

Decision of the European Ombudsman on complaint 1423/2003/(BB)MHZ against the European Personnel Selection Office

Decision

Case 1423/2003/(BB)MHZ - **Opened on** 09/09/2003 - **Decision on** 04/11/2004

Strasbourg, 4 November 2004

Dear X.,

On 25 July 2003, you made a complaint to the European Ombudsman against the European Personnel Selection Office (EPSO) concerning your treatment as a candidate in Open Competition COM/B/1/02.

On 9 September 2003, I forwarded the complaint to the Director of the European Personnel Selection Office.

On 10 December 2003, I received an opinion from the Commission, which was expressed as containing the joint views of EPSO and the Commission. On 15 December 2003, the Commission sent the translation of the opinion into English.

I forwarded the opinion to you on 27 January 2004, with an invitation to make observations. No observations were received from you. On 16 March 2004, my services contacted you by telephone concerning a possible friendly solution to your complaint.

On 15 June 2004, I made a proposal for a friendly solution to EPSO. On 29 July 2004, I received the answer from the Commission (expressed as containing the joint views of EPSO and the Commission) and on 3 August 2004, I received its translation into English, which I forwarded to you.

No written observations were received from you. However on 7 September 2004, you confirmed to my services by telephone that you considered that a friendly solution had been brought about.

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

THE COMPLAINT



According to the complainant, the relevant facts were as follows:

The complainant applied for Open Competition COM/B/1/02, published in the Official Journal C32A of 5 February 2002, which was organised to constitute a reserve list of administrative assistants (B5/B4) in the fields of financial management and project/contract management.

On 23 May 2003, the complainant took part in the written test in Brussels. At the beginning of the test, he was the first of the French-speaking participants to discover that annex II of subject II of the test was in English instead of in French. After hesitating for about 15 minutes, the complainant informed the test supervisors of the problem. Following his intervention, the spokesman advised all the French-speaking candidates about the error and, an hour after the test had started, the French-speaking candidates received the correct annex. Furthermore, during the examination the complainant used only a standard calculator, as stipulated in the invitation letter to the written test. He noticed, however, that several other participants in the competition were freely using so-called "scientific" calculators.

On 3 June 2003, the complainant addressed an e-mail to EPSO. He referred to the use by participants in the examination of more advanced calculators than the standard calculators authorised in the written instructions and also to the inclusion of the wrong annex in English to the questions in French. He noted that this incident had a serious negative affect on his subsequent overall performance.

He received a reply from EPSO on 1 July 2003. In its reply, EPSO admitted to the distribution of a text in English instead of French, but denied that it could have had a negative impact on the results of the French-speaking candidates, because of the corrective action which was taken by the test organisers. EPSO also explained that the use of standard calculators was required in order to avoid candidates bringing portable computers into the examination centre and that all the questions could be answered with the aid of a standard calculator.

On 25 July 2003, the complainant lodged a complaint with the European Ombudsman. He alleged that the distribution of the wrong text to candidates had detrimental consequences on his performance during the written test. He argued that this mistake made him lose fifteen minutes which represented 8,33% of the overall time given to the candidates to complete the written test.

He also alleged that he suffered considerable disadvantage by using a simple calculator as specified in the invitation letter and the instructions to the candidates.

The complainant claimed that the organisers of the competition tests should use more specific language in their instructions concerning which calculators are authorised and that they should check documents before distribution. He gave examples of university instructions concerning the use of calculators during examinations. In addition, he claimed that EPSO should annul Open Competition COM/B/1/02.



The complainant enclosed with his complaint a letter that he had sent to EPSO the same day. In this letter he underlined that he was the one who first discovered the error in the distribution of the test papers.

THE INQUIRY

The opinion of EPSO and the Commission

The Ombudsman forwarded the complaint to the Director of the European Personnel Selection Office (EPSO). The Ombudsman received an opinion from the Commission, which was expressed as containing the joint views of EPSO and the Commission. The opinion can be summarised as follows.

The complainant applied for Open Competition COM/B/1/02, choosing the field of financial management. After the pre-selection tests, which he passed successfully (obtaining one of 500 highest scores), he was invited by EPSO to complete an application form and to take part in the written test. On 5 August 2003, EPSO informed the complainant that he was not admitted to the oral test because he had not obtained the minimum required for the written test (he scored 6.8 out of 40, when the minimum required to pass was 20).

As regards the allegation concerning the distribution of the wrong text, EPSO admits that the French-speaking candidates did indeed receive the second annex of Subject II in English instead of in French. EPSO regrets this human error but underlines that the necessary steps were taken to remedy the problem as soon as it was brought to the test supervisor's attention. EPSO points out that the written test allowed a total of three hours to cover three subjects, which were independent from each other. The mistake was discovered soon after the start of the test. The French-speaking candidates were then advised to start with Subjects I and III, before replying to the questions in the Subject II. One hour after the test had started, which means that the candidates still had two hours to reply, the French-speaking candidates received the annex in French. In addition, EPSO pointed out that candidates were writing on separate pieces of lined paper and that they could start on another subject by adding papers, without mixing them up. Taking into account the advice given to candidates and the duration of the written exam, EPSO considers that it dealt adequately with this incident. EPSO also argued that any inconvenience to individual candidates would have resulted not from the mistake, which was properly rectified, but from the candidate's own organisational skills.

As regards the allegation concerning calculators, EPSO stated that the Selection Board had specified only so-called "non-scientific" calculators in order to make sure that candidates would not bring portable PCs to the examination centre. Given the nature and the level of difficulty of the calculations, the Selection Board took the view that a so-called "scientific" calculator was not necessary to solve the problems submitted to candidates. Moreover, by informing the candidates invited to the written test that they were allowed to use a non-scientific calculator, the Selection Board's aim was to respect the principle of equal treatment between candidates, all of whom had the same information on the arrangements for the competition and were placed in an identical position. In EPSO's view, the instructions were sufficient to enable the candidates to act with full knowledge of the facts.



As regards the complainant's claims regarding the checking of examination papers before their distribution, EPSO emphasises that all tests are checked many times when an examination is prepared and that EPSO verifies whether all examination centres have sufficient copies of each test for all the languages concerned. EPSO takes the view, however, that given the number of tests, the number of participants and the number of language versions, it is impossible to check every page of every copy of every language version. EPSO also made the remark that, as concerns the alleged test, page-by-page manual checking of the test papers would mean checking 35 000 pages, which would go beyond a rational use of resources. Furthermore, EPSO notes that mistakes of this kind in the compilation of test papers are rare and, that when they do occur, EPSO is able to undertake rapid remedial action on the day of competition (for instance, thanks to the rental of high-speed photocopiers at each competition centre).

In reply to the complainant's request that competition COM/B/1/02 should be declared null and void, EPSO states the Selection Board cannot do this. EPSO emphasises that a simple mistake does not constitute an illegality that would invalidate the entire test. EPSO also notes that if a mistake occurs, it must be dealt with properly and as quickly as possible. In the present case, EPSO considers that the mistake was remedied in an appropriate way: the mistake was found fifteen minutes after the start of the test, the candidates were informed immediately and advised to start working on the other parts of the test and forty five minutes later they received the missing pages which still gave them two hours to complete all sections.

The complainant's observations

After receiving the opinion of EPSO and the Commission, the complainant informed the Ombudsman's services by telephone that, in the context of a possible friendly solution, he would be willing to drop his claim that the competition should be annulled. However, he maintained his other claims and allegations and insisted on the fact that he was the one who first discovered the error in the distribution of the test papers.

The complainant did not send written observations.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the complaint and the opinion sent by the Commission and EPSO, the Ombudsman wrote to the Director of EPSO on 15 June 2004 to propose a friendly solution in accordance with Article 3(5) of the Statute (1) .

The Ombudsman's proposal was made on the basis of the following analysis of the issue in dispute between the complainant and the Commission:

1.1. The complainant alleged that he suffered considerable disadvantage by using a simple calculator as specified in the invitation letter and the instructions to the candidates. According to the complainant, several other participants in the competition were freely using so-called "scientific" calculators. The complainant claims that the organisers of the competition tests



should use more specific language in their instructions concerning which calculators are authorised.

1.2. According to EPSO, all the questions could be solved with a standard or a so-called "non-scientific" calculator and a so-called "scientific" calculator was not necessary. Again according to EPSO, the Selection Board wanted to avoid candidates using portable computers and, for that reason, only non-scientific calculators were allowed. Moreover, EPSO considers that the Selection Board's aim was to respect the principle of equal treatment and that all candidates had the same information on the arrangements for the competition and were placed in an identical position. Finally, in EPSO's view the instructions were sufficient to enable candidates to act with full knowledge of the facts.

1.3. The Ombudsman understands that the complainant and EPSO agree that two types of calculator were used during the examination: the so-called "scientific" calculator and a type of calculator with less functionality, which EPSO has referred to in its opinion on the complaint as a "standard" or "non-scientific" calculator. The Ombudsman also notes that EPSO has explained that its instructions to candidates (which referred to a "simple" calculator) were intended to avoid the eventuality that candidates might use portable computers.

1.4. The Ombudsman takes the view that EPSO could have given clearer instructions, for example, by specifying that any type of calculator was permitted but that portable computers were not to be used (which was EPSO's declared objective), or by using more precise language or criteria to describe permissible types of calculator, or by designating permissible models. Furthermore, the Ombudsman does not understand EPSO to contest the complainant's argument that different candidates appear to have interpreted differently its instructions regarding calculators.

1.5. The Ombudsman recalls that the Community courts have recognised that Community recruitment must respect the principle of equality. This principle requires that comparable situations shall not be treated differently and different situations should not be treated in the same way, unless such difference in treatment is objectively justified (2) .

The Ombudsman notes that the instructions were the same for all candidates so they received in fact the same treatment (were placed all in an identical position) as regards the receipt of information. However, unclear and imprecise wording of instructions may lead to misinterpretation or different interpretation of the terms of instruction, and, in consequence, place the candidates in different positions, against the principle of equality.

1.6. In view of the above, the Ombudsman's provisional conclusion was that EPSO's failure to respond positively to the complainant's suggestion that it should use more specific language in its instructions to candidates in the future could be an instance of maladministration.

The proposal for a friendly solution

On the basis of the above considerations, the Ombudsman made the following proposal to EPSO for a friendly solution:



EPSO could respond in a positive spirit to the complainant's claim that it should use more specific language in its instructions concerning calculators in the future.

The Ombudsman also noted that the complainant, both in his original complaint and his observations, laid stress on the fact that he was the first to discover the error in the distribution of the test papers. The Ombudsman considered it would be both appropriate and helpful in promoting a friendly solution, if EPSO could expressly acknowledge that this was so.

The Commission's reply

The Commission replied on 29 July 2004 that EPSO accepted the Ombudsman's proposal for a friendly solution.

EPSO acknowledged that in future, and as far as possible, more precise instructions concerning the use of calculators during tests would be provided to competition candidates.

EPSO also acknowledged that an error occurred in constituting the test dossier. EPSO feels, however, that this is not sufficient to cast doubt on the reasonableness of the decision concerning the complainant. EPSO underlined that it made all the requisite arrangements on the day of the tests as soon as the error was detected to avoid any adverse repercussions for candidates' performance.

Although the examination centre report does not make explicit reference to names of persons, EPSO nonetheless has no objection to the complainant's claim that he was one of the first to indicate the error in the composition of the dossier.

The complainant's observations

No written observations on this reply were received from the complainant. In a telephone conversation with the Ombudsman's office on 7 September 2004, the complainant confirmed that a friendly solution had been brought about.

THE DECISION

1 The calculator issue

1.1. On 15 June 2003, the Ombudsman proposed a friendly solution between the complainant and EPSO. This was based on the conclusion that there could be an instance of maladministration because EPSO had failed to respond positively to the complainant's suggestion that it should use more specific language in its instructions to candidates in the future.

1.2. The friendly solution consisted in asking EPSO to respond in a positive spirit to the complainant's claim that it should use more specific language in its instructions concerning calculators in the future.

The Ombudsman also noted that the complainant, both in his original complaint and his observations, laid stress on the fact that he was the first to discover the error in the distribution of the test papers. Therefore, the Ombudsman considered it would be both appropriate and helpful in promoting a friendly solution, if EPSO could expressly acknowledge that this was so.



1.3. On 29 July 2004, the Commission informed the Ombudsman that EPSO accepted the friendly solution.

EPSO acknowledged that in future, and as far as possible, more precise instructions concerning the use of calculators during tests would be provided to competition candidates.

EPSO also acknowledged that an error occurred in constituting the test dossier. EPSO feels, however, that this is not sufficient to cast doubt on the reasonableness of the decision concerning the complainant. EPSO underlined that it made all the requisite arrangements on the day of the tests as soon as the error was detected to avoid any adverse repercussions for candidates' performance.

Although the examination centre report does not make explicit reference to names of persons, EPSO nonetheless has no objection to the complainant's claim that he was one of the first to indicate the error in the composition of the dossier.

1.4. In a telephone conversation with the Ombudsman's Office on 7 September 2004, the complainant confirmed that a friendly solution had been brought about.

2 Conclusion

Following the Ombudsman's initiative, it appears that a friendly solution to the complaint has been agreed between EPSO and the complainant. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) "As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint".

(2) Joined cases T-94/01, T-152/01 and T-286/01, *Hirsch, Nicastro, Priesemann v. European Central Bank*, judgement of 8 January 2003, paragraph 51 and the case-law cited there.