

Decision of the European Ombudsman on complaint 1571/2003/OV against Europol

Decision

Case 1571/2003/OV - Opened on 22/09/2003 - Decision on 01/12/2004

Summary of decision on complaint 1571/2003/OV against Europol

The complainant worked for Europol as an administrative assistant from 1 May 2001 to 1 April 2003. However, after having been recruited, she found out that she had been recruited as a local staff member and not as a Europol staff member, as prescribed by Europol's Staff Regulations. The complainant, thus being employed with less advantageous final conditions, wrote to the Director of Europol asking for rectification and compensation, but this request, as well as a later appeal, were rejected.

In August 2003, the complainant lodged a complaint with the European Ombudsman, alleging that Europol had failed to respect its Staff Regulations (Articles 1, 2 and 3, plus Appendix 1) by recruiting her, in the position of administrative assistant, as a local staff member and not as a Europol staff member. The complainant also claimed compensation.

In its opinion on the complaint, Europol stated that, given the inflexibility of the recruitment system, it had to resort to employing temporary staff under conditions applicable to local staff, in those situations where the Establishment plan did not foresee Europol posts and the workload was such that temporary assistance was required. Even if it is true that this policy entailed employing personnel as members of local staff in positions other than those formally described in Appendix 1 of the Europol Staff Regulations, Europol was free to do so as long as it stayed within the limits of its personnel budget. Europol also contested that the complainant had suffered any financial damage. It pointed out that the only alternative for Europol would have been not to employ the complainant at all.

In his decision, the Ombudsman pointed out that Appendix 1 to the Europol Staff Regulations clearly mentioned that a post of administrative assistant "shall be" a Europol post. Furthermore, the Ombudsman did not find in the Europol Staff Regulations any legal basis which could justify Europol's practice of employing temporary staff under conditions applicable to local staff in the situation where the Establishment plan did not foresee Europol posts. The Ombudsman concluded that Europol had failed to respect its Staff Regulations by recruiting the complainant as an administrative assistant under a local staff contract. He therefore made a critical remark. With regard to the claim for compensation, the Ombudsman however considered that the



complainant had not shown that she suffered any loss as a result of the maladministration, because Europol's argument that the only alternative to employing her as a local staff member would have been not to employ her at all, did not seem unreasonable. The Ombudsman considered that the critical remark was sufficient to draw Europol's attention to the need to review its practice with regard to the engagement of its staff.

Strasbourg, 1 December 2004

Dear Mrs de C.,

On 26 August 2003, you made a complaint to the European Ombudsman on behalf of your client Ms P. (hereafter "the complainant") against Europol concerning her recruitment as a local staff member and not as an Europol staff member.

On 22 September 2003, I forwarded the complaint to the Director of Europol. Europol sent its opinion on 23 December 2003. I forwarded it to you with an invitation to make observations, which you sent on 27 February 2004.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant's lawyer, the relevant facts were as follows:

On 1 May 2001, the complainant started to work at Europol as an administrative assistant. From her contract with Europol, it appears that she was recruited as a "local staff" member, with less advantageous (financial) conditions applicable than for Europol staff. In September 2001, the complainant discovered that she had been recruited contrary to Europol's Staff Regulations, as the post of administrative assistant should be a Europol post and not a local staff post. On 21 August 2002, the complainant's lawyer wrote to the Director of Europol asking for rectification as well as compensation. The Director rejected this request on 16 December 2002. The complainant made an appeal on 14 March 2003 which was rejected on 11 June 2003.

On 26 August 2003, the complainant's lawyer lodged the present complaint with the Ombudsman. The complainant alleges that Europol has failed to respect Europol's Staff Regulations (Articles 1, 2 and 3, plus Appendix 1), by recruiting her, in the position of administrative assistant, as a local staff member and not as a Europol staff member, and claims financial compensation.

THE INQUIRY

Europol's opinion

The complainant was employed by Europol as a local staff member in the period between 1 May 2001 and 1 April 2003.



Europol's Staff Regulations (1) provide for two categories of staff which can be employed by Europol: members of Europol staff and members of local staff. Whether or not a particular post can only be filled by individuals belonging to one or the other of these categories is determined in principle by Appendix 1 to the Europol Staff Regulations. The Europol Staff Regulations also foresee different procedures and conditions for the recruitment of Europol staff and local staff. Members of local staff are employed under Dutch national legislation, whereas members of Europol staff are subject to the Europol Staff Regulations as established by the Council. Also, appointment as a member of Europol staff is only possible for those persons who have successfully participated in a selection procedure.

All Europol positions are laid down in the Establishment plan, which is adopted by the Council as part of Europol's budget for each year. Appointments as a member of Europol staff outside the limits set by this Establishment Plan are not legally possible.

Given the inflexibility of the recruitment system, Europol has had to resort to employing temporary staff under conditions applicable to local staff, in those situations where the Establishment plan did not foresee Europol posts and temporary assistance was required. This occurred for example in situations where a regular member of staff was ill for a long period, or in periods where the workload temporarily increased.

Europol's position has been that, even if it is true that this policy entailed employing personnel as members of local staff in positions other than those formally described in Appendix 1 of the Europol Staff Regulations, Europol was free to do so as long as it stayed within the limits of its personnel budget.

In essence, the complaint is that the complainant was employed by Europol as a member of local staff, whereas she alleges that she should have been awarded a contract as a formal Europol staff member. In the correspondence with the complainant's lawyer, Europol has explained the reasons why it feels that this allegation is incorrect. These reasons are the following:

The main argument put forward by Europol is that the complainant entered into a contract with Europol willingly and freely, well knowing that this contract was as a member of local staff, governed by Dutch law. This is stated explicitly in the contract documents, as well as in correspondence with the complainant. This fact as such has not been contested by the complainant or her lawyer.

Secondly, Europol's position is that it was impossible to offer the complainant a contract as a Europol staff member, since she had not successfully followed the recruitment procedures foreseen by Europol's Staff Regulations. Although the complainant did participate in one of these recruitment procedures for Europol staff, she was not selected.

Thirdly, the Establishment Plan did not foresee a Europol post of administrative assistant in the unit she worked in, whilst the workload of that unit was such that temporary assistance was



required.

Europol also contests that the complainant has suffered financial damage as a consequence of her employment as a member of local staff, given the fact that it was legally not possible to employ the complainant as a member of Europol staff. Since there was no Europol post available, and the complainant did not successfully participate in a selection procedure for those posts which were available, the only alternative for Europol would have been not to employ the complainant at all.

The complainant's observations

The complainant maintained her complaint. Articles 2 and 3 of Europol's Staff Regulations and Appendix 1 are clear and do not leave any doubt as regards which personnel constitute Europol staff. Contrary to what Europol claimed in its opinion, the Europol Staff Regulations do not make the hiring of Europol staff dependent on having successfully passed a selection procedure. The complainant mentioned one example of an Europol staff member who had not passed a selection procedure.

The complainant contests Europol's argument that she signed the contract willingly and freely, well knowing that this contract pertained to local staff members. When the complainant signed her contract, she did not know that the function was that of a Europol staff member, because she was not given a copy of Appendix 1 of the Staff Regulations. The complainant could thus not know that she was signing a contract which was not in accordance with the Staff Regulations.

The complainant also points out that she did pass a selection procedure concerning the post of second officer which became vacant and that she became a reserve candidate.

The argument that the complainant was engaged because of the increased workload is not correct, because the complainant's contract was extended after one year and a replacement was foreseen when the complainant left. The complainant thus occupied a regular administrative post.

The complainant argues that, if she had been hired in accordance with the Staff Regulations, she would have derived financial advantages which she now has missed. The complainant therefore rejects Europol's argument that she did not suffer financial damage.

THE DECISION

1 The alleged recruitment of the complainant contrary to Europol's Staff Regulations

1.1 The complainant alleges that Europol has failed to respect Europol's Staff Regulations (Articles 1, 2 and 3, plus Appendix 1), by recruiting her - in the position of administrative assistant - as a local staff member and not as a Europol staff member.

1.2 Europol observed that, given the inflexibility of the recruitment system, it had to resort to employing temporary staff under conditions applicable to local staff, in those situations where the Establishment plan did not foresee Europol posts and the workload was such that temporary



assistance was required. Even if it is true that this policy entailed employing personnel as members of local staff in positions other than those formally described in Appendix 1 of the Europol Staff Regulations, Europol was free to do so as long as it stayed within the limits of its personnel budget.

Europol further argued that the complainant entered into a contract with Europol willingly and freely, well knowing that this contract pertained to members of local staff and was governed by Dutch law. It was impossible to offer the complainant a contract as an Europol staff member, since she had not successfully passed the recruitment procedures foreseen by Europol's Staff Regulations. Finally, the Establishment Plan did not foresee a Europol post as administrative assistant in the unit she worked in.

1.3 The Ombudsman notes that Article 2 of the Europol Staff Regulations provides that "(...) 'Europol staff' means staff engaged to fill a post which is included in the list of posts in Appendix 1, with the exception of posts marked as local staff". Article 3 provides that "(...) 'local staff' means staff engaged according to local law for manual or service duties, assigned to a post marked as such in the list of posts in Appendix 1".

1.4 Paragraph 1 of Appendix 1 to the Europol Staff Regulations provides that "*subject to paragraph 3, the following posts shall be Europol posts: (...) Assistants - Administrative assistants (all relevant departments)*". Paragraph 3 of Appendix A provides that "*the Management Board of Europol shall, in accordance with Article 28(1)(15) of the Europol Convention, take part in the drawing up of the budget and the establishment plan. In that context, it shall propose to the Council the extent to which the posts listed in this Appendix may be filled or combined*".

1.5 The Ombudsman notes that the complainant was employed by Europol, clearly as an administrative assistant, from 1 May 2001 to 1 April 2003. Although the contract signed by the complainant with Europol on 2 May 2001 was entitled "*Contract of employment for local staff appointed by Europol*", it explicitly foresees in its first Article that "*the employee shall be employed as Administrative Assistant with the Human Resources Unit on the conditions as implied in the Regulations*". The extension for one year of the contract, signed on 24 April 2002, again stated that "*Mrs P. will be employed as Administrative Assistant with the Human Resources Unit (...)*". The Ombudsman also notes that Europol has not contested in its opinion that the complainant was employed as an administrative assistant.

1.6 According to Appendix 1 to the Europol Staff Regulations, the complainant's post of administrative assistant is a Europol post and not a post for local staff. The Staff Regulations are clear in this respect and do not appear to leave any place for doubt, as Appendix 1 states that the following posts "*shall be*" Europol posts.

1.7 Europol recognised in its opinion that it has adopted a practice of employing temporary staff like the complainant under conditions applicable to local staff, namely in the situation where the Establishment plan did not foresee Europol posts. Europol claims it was entitled to do so as long as it stayed within the limits of its personnel budget.



1.8 With this regard, the Ombudsman did not find in the Europol Staff Regulations any legal basis which would justify this course of action. More particularly, the Europol Staff Regulations do not contain any provision according to which posts for administrative assistants could, under certain circumstances, be filled by hiring local staff.

1.9 On the basis of the above, the Ombudsman comes to the conclusion that Europol has failed to respect its Staff Regulations by hiring the complainant as an administrative assistant under a local staff contract. This constitutes an instance of maladministration and the Ombudsman makes the critical remark below.

2 The claim for financial compensation

2.1 The complainant claims financial compensation.

2.2 Europol contests that the complainant has suffered any financial damage as a consequence of her employment as a member of local staff, given the fact that it was legally not possible to employ the complainant as a member of Europol staff. Since there was no Europol post available, and the complainant did not successfully participate in a selection procedure for those posts which were available, the only alternative for Europol would have been not to employ the complainant at all.

2.3 The Ombudsman considers that the complainant has not shown that she suffered any loss as a result of the maladministration identified in point 1.9 above, because Europol's argument that the only alternative to employing her as a member of local staff would have been not to employ her at all does not seem unreasonable. The Ombudsman therefore considers that it is not appropriate to further pursue this aspect of the complaint.

2.4 The Ombudsman would like to point out, however, that the complainant has the possibility to pursue a claim for financial compensation before a court of competent jurisdiction.

3 Conclusion

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

Europol has failed to respect its Staff Regulations by hiring the complainant as an administrative assistant under a local staff contract. This constitutes an instance of maladministration.

Given that this aspect of the case concerns procedures relating to specific events in the past, and that the complainant's contract expired on 1 April 2003, it is not appropriate to pursue a friendly settlement of the matter. Moreover, the Ombudsman considers that the above critical remark is sufficient to draw Europol's attention to the need to review its practice with regard to the engagement of its staff. The Ombudsman therefore closes the case.

The Director of Europol will also be informed of this decision.

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) Council Act of 3 December 1998 laying down the staff regulations applicable to Europol employees, OJ 1999 C 26/23.