

Decision of the European Ombudsman on complaint 2046/2003/GG against the Council of the European Union

Decision

Case 2046/2003/GG - Opened on 17/11/2003 - Decision on 03/05/2004

A Council official wished to make use of measures introduced by the Council to offer its officials special early retirement ("dégagement") in the context of the modernisation of the institution. A Council Regulation provided that the Secretariat General of the Council should select the officials to whom it wished to grant early retirement from the list of applicants after having consulted its Joint Committee. The Joint Committee consists of an equal number of representatives of the Appointing Authority and the Staff Committee. According to a Decision implementing the Regulation, the Council's Deputy Secretary General was to establish a draft list of candidates, which was then to be submitted to the Joint Committee for an opinion.

In his complaint to the Ombudsman, the complainant stated that his application had been rejected, as had been his complaint to the Council. He criticised that the Joint Committee had not been given access to the personal files of the applicants, which, in his view, had rendered the Joint Committee incapable of providing the Appointing Authority with a substantiated opinion. He claimed that the Decision implementing the Regulation should be repealed. As a supporting document, the complainant submitted an unsigned declaration by members of the Joint Committee. According to the declaration, members of the Joint Committee had several times asked for access to the files, subject to the applicants' consent, but such access had been categorically refused.

In its opinion, the Council argued that the Decision was entirely in conformity with the Regulation. The Joint Committee had had all information it needed to assess the list of candidates. However, the information supplied had had to stay short of divulging personal data, in accordance with internal data protection provisions.

The Ombudsman accepted that the Decision was in conformity with the Council Regulation in so far as the list of officials was only adopted *after* consultation of the Joint Committee. However, he considered that in order to be able to form and express its views in a useful way, the Joint Committee had to be in possession of all relevant information. Otherwise, the consultation would amount to a mere formality. The Ombudsman was aware that access to personal data could only be granted in conformity with data protection provisions. However, even if there was no provision that would allow the Council to grant access to the files, it should



have provided for the possibility to grant such access.

The Ombudsman concluded that by refusing to grant the Joint Committee access to the files or by failing to ensure the possibility that such access could be granted, the Council had failed to give the Joint Committee the possibility to express its views in a useful way. Thus, the Council had failed properly to consult the Joint Committee, which constituted an instance of maladministration. A critical remark was made.

Strasbourg, 3 May 2004

Dear Mr M.,

On 28 October 2003, you made a complaint against the Council of the European Union concerning the alleged failure of the latter properly to consult the Joint Committee in the matter of special early retirement.

On 17 November 2003, I forwarded the complaint to the Secretary General of the Council. The Council sent its opinion on 9 February 2004. I forwarded it to you with an invitation to make observations, which you sent on 13 April 2004.

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

THE COMPLAINT

Background

Council Regulation (EC, Euratom) No 1747/2002 of 30 September 2002 introducing, in the context of the modernisation of the institution, special measures to terminate the service of officials of the European Communities appointed to an established post in the Council of the European Union (1) enables the Council to terminate the service of a limited number of its officials who wish to make use of this possibility (the so-called “dégagement”). Article 1 of the Regulation provides that this measure can be applied to officials who have reached the age of 55 and completed at least 15 years of service, with the exception of those in grades A 1 and A 2. According to Article 2 of the Regulation, the total number of officials to be covered in the years 2003 and 2004 is to be 94. Article 3 (1) provides that, within the ceilings laid down in Article 2, “and with due regard to the interests of the service, the Secretariat General of the Council, after having consulted its Joint Committee, shall select, from among the officials applying for termination of their service under Article 1, those to whom it wishes to apply this measure”.

According to Article 3 (2) of the Regulation, officials affected by the Council's reorganisation measures are to be considered as a priority. Account also has to be taken of the amount of training that would be necessary for such officials to undertake new tasks, their age, ability, performance, conduct in the service, family circumstances and length of service.

Article 4 of the Regulation provides that officials whose service is terminated in accordance with the Regulation are entitled to a monthly allowance of between 60 and 70 % of their last basic



salary, depending on their age and the length of their service. This entitlement ceases at the latest when the official concerned reaches the age of 65 (and is then replaced by the normal retirement pension). This explains why such termination of office is considered as a form of early retirement by the officials concerned.

According to Article 9 (4) of the Staff Regulations, the Joint Committee may, in addition to the functions assigned to them by these Staff Regulations, be consulted by the Appointing Authority or by the Staff Committee on questions of a general nature which either of the latter thinks fit to submit. Article 2 of Annex II to the Staff Regulations provides that the Joint Committee consists of a chairman appointed by the Appointing Authority and members and alternates appointed in equal numbers by the Appointing Authority and by the Staff Committee.

Measures to implement Regulation No 1747/2002 are laid down in Decision No 484/02 of the Deputy Secretary General of the Council of 14 November 2002. According to Article 6 of the Decision, the Council's Deputy Secretary General is to establish a draft list of candidates, which is then to be submitted to the Joint Committee for an opinion. According to Article 7 of the Decision, the Joint Committee has to submit its opinion within 15 working days. Article 8 of the Decision provides that the list of the officials whose service is to be terminated is established after the Joint Committee has given its opinion, or after the period foreseen for the submission of this opinion has expired.

In 2002, the complainant, a Council official, submitted an application to have his service terminated in accordance with the above-mentioned provisions and in the context of the "dégagement" exercise for 2003. This application was rejected by the Council by decision of 26 March 2003.

Complaint 1587/2003/GG

On 25 June 2003, the complainant forwarded to the Ombudsman a copy of a complaint he had lodged with the Council on 23 June 2003 pursuant to Article 90 (2) of the Staff Regulations and which was directed at the decision of 26 March 2003.

On 27 August 2003, the complainant wrote to the Ombudsman to ask why he had not yet received an acknowledgement of receipt for his complaint.

Upon receipt of this letter, the Ombudsman realised that the complainant wished his letter of 25 June 2003 to be treated as a complaint. The relevant letter was thus duly registered as a complaint (1587/2003/GG). This complaint concerned what the complainant considered to be a failure on the part of the Appointing Authority properly to consult the Joint Committee in the matter of special early retirement. The complaint was rejected by the Ombudsman on 3 September 2003 on the grounds that the complainant had not yet exhausted all the internal remedies that were available to him under the Staff Regulations, given that he had lodged an Article 90 (2) complaint on 23 June 2003 and that the period within which the Council had to reply to this complaint had not yet expired.

The new complaint

On 28 October 2003, the complainant informed the Ombudsman that his Article 90 (2) complaint had been rejected by the Council on 21 October 2003 and that he wished to renew his



complaint to the Ombudsman. This new complaint was registered under reference 2046/2003/GG.

The complainant in substance alleged that the Appointing Authority had failed properly to consult the Joint Committee in this matter. In his view, Decision no 484/02 of the Deputy Secretary General of 14 November 2002 was in conflict with Regulation No 1747/2002 since it reversed the sequence of events, culminating in the list of beneficiaries of the “dégagement” being put to the Joint Committee last, effectively confronting the latter with a ‘fait accompli’ and leaving it no margin, or even means, of assessment. The complainant pointed out that the staff of the institution was represented on the Joint Committee and that it was therefore in this committee that members of staff could hope to have their interests defended against any machinations on the part of the administration. It was thus particularly serious that the members of the Joint Committee had in fact been denied access to the files of the officials who had applied. In the complainant’s view, the Joint Committee had thus been rendered incapable of providing the Appointing Authority with a duly substantiated opinion on the list of officials to whom the termination-of-service measures could apply.

The complainant claimed that Decision No 484/02 should be repealed and replaced by a Decision which respects the order of procedure laid down in Regulation 1747/2002.

In the cover note accompanying his complaint, the complainant pointed out that he was not hoping to achieve termination of service by his complaint but that he was trying to make the Council’s administration face up to its responsibilities towards its staff.

Among the supporting documents submitted by the complainant was an unsigned document dated 18 March 2003 that appeared to constitute a declaration by the members of the Joint Committee who had been appointed by the Staff Committee. According to this declaration, members of the Joint Committee appointed by the Staff Committee had on several occasions asked for access to the files of all the applicants, subject to the applicants’ consent. Also according to the declaration, such access had been categorically refused by the Appointing Authority.

THE INQUIRY

The Council's opinion

In its opinion, the Council made the following comments:

The object of the present complaint was different from that presented to the Council under Article 90 (2) of the Staff Regulations. According to the present complaint, the complainant wished to see Decision No 484/02 repealed and replaced by a decision which respected the order of procedure laid down in Regulation 1747/2002, whereas the Article 90 (2) complaint called for the decision of the Appointing Authority rejecting his application for “dégagement” for the 2003 exercise to be reviewed and re-examined in compliance with the letter and the spirit of Regulation 1747/2002. The complainant had thus failed to exhaust all possibilities for internal administrative requests before presenting a complaint to the Ombudsman as he was not



presenting a complaint in the hope of being granted early retirement.

The complainant had again applied for “dégagement” for the 2004 exercise.

As to substance, the complainant had not presented any reasons as to why Decision No 484/02 should be repealed. The Decision was entirely in conformity with Regulation No 1747/2002 and it was in line with analogous provisions enacted by the Commission.

According to the Decision, the procedure to determine the list of officials to whom it was envisaged to apply “dégagement” was not reversed as the complainant had alleged. This procedure foresaw the following steps: (a) the Appointing Authority considered the applications and verified that applicants fulfilled the criteria of age and length of service; (b) the service to which the official was assigned assessed the interest of the official’s “dégagement”, classifying the application in one of three groups (“dégagement” presenting considerable interest, little interest or no interest to the service); (c) on the basis of these considerations and of other legal criteria, the Appointing Authority (2) drew up a list of officials to whom it was envisaged that the “dégagement” provisions should apply, for consideration by the Joint Committee and (d) after the Joint Committee had rendered its opinion or after the termination of the period set for rendering such opinion, the Appointing Authority adopted the final list. This by no means reversed the procedure laid down by Regulation No 1747/2002, as the list of officials was only adopted *after* consultation of the Joint Committee.

All steps and procedures had been carefully observed. The Joint Committee had not only been provided with the list but also with other pertinent documents, such as the lists of applications divided into the aforementioned groups (considerable interest, little interest, no interest) and lists of all potential and actual applicants. Furthermore, the Director-General of Administration and Personnel had been present at the meeting of the Joint Committee where this subject had been discussed and had answered all questions regarding general and particular aspects of the “dégagement” exercise (namely the criteria followed). However, in accordance with the rules of Regulation No 45/2001, the information supplied had had to stay short of divulging personal data concerning each and every applicant (3) . The Appointing Authority had made an undertaking, under Article 11 of Regulation 45/2001, to the effect that the sole recipients of the data were the Appointing Authority and DG A I. This had been clearly indicated in an annex to Staff Note 157/2002 of 22 November 2002. Therefore, the Appointing Authority’s refusal to divulge personal data collected with such guarantees attached had been absolutely justified, and the issue had never been contested or even addressed by the complainant.

Given that the Joint Committee had rendered a divided opinion, the Appointing Authority had decided to adopt the list as it had been proposed.

The complainant was aware of the fact that his application had been considered of little interest and that there was no record of his personal case having been brought up in the discussions.

In conclusion, the Council submitted that all applications, including the complainant’s, had been properly considered according to the applicable legal provisions, and that the establishment of



the final list was in no way faulty.

The complainant's observations

In his observations, the complainant maintained his complaint. He reiterated his view that the Joint Committee had not been consulted *before* the list of officials whose service was to be terminated was drawn up. In the complainant's view, the Joint Committee had instead merely been confronted with and instructed to adopt a list of names concocted by the Deputy Secretary General and three high officials. The complainant submitted that all applicants had, by the very act of applying, tacitly accepted the fact that their applications would be scrutinised by the Joint Committee.

THE DECISION

1 Introductory remarks

1.1 Council Regulation (EC, Euratom) No 1747/2002 of 30 September 2002 introducing, in the context of the modernisation of the institution, special measures to terminate the service of officials of the European Communities appointed to an established post in the Council of the European Union (4) enables the Council to terminate the service of a limited number of its officials who wish to make use of this possibility (the so-called "dégagement"). Article 1 of the Regulation provides that this measure can be applied to officials who have reached the age of 55 and completed at least 15 years of service, with the exception of those in grades A 1 and A 2. According to Article 3 (1) of the Regulation, "the Secretariat General of the Council, after having consulted its Joint Committee, shall select, from among the officials applying for termination of their service under Article 1, those to whom it wishes to apply this measure". Measures to implement Regulation No 1747/2002 are laid down in Decision No 484/02 of the Deputy Secretary General of the Council of 14 November 2002. According to Article 6 of the Decision, the Council's Deputy Secretary General is to establish a draft list of candidates which is then to be submitted to the Joint Committee for an opinion. According to Article 7 of the Decision, the Joint Committee has to submit its opinion within 15 working days.

1.2 In 2002, the complainant, a Council official, submitted an application to have his service terminated in accordance with the above-mentioned provisions and in the context of the "dégagement" exercise for 2003. This application was rejected by the Council by decision of 26 March 2003. On 23 June 2003, the complainant lodged a complaint with the Council pursuant to Article 90 (2) of the Staff Regulations. This complaint was rejected by the Council on 21 October 2003. On 28 October 2003, the complainant turned to the Ombudsman. In this complaint, the complainant criticised, among other things, the fact that the Joint Committee had not been given access to the applications that had been submitted to the Council.

1.3 In its opinion, the Council takes the view that the complainant did not exhaust all possibilities for internal administrative requests before presenting his complaint to the Ombudsman.

1.4 Article 2 (8) of the Statute of the European Ombudsman (5) provides that no complaint that concerns work relationships between Community institutions and bodies and their staff may be made to the Ombudsman unless all the possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Articles 90 (1) and (2) of the



Staff Regulations, have been exhausted.

1.5 The Council argues that the object of the present complaint was different from that presented to it under Article 90 (2) of the Staff Regulations, given that according to the present complaint, the complainant wished to see Decision No 484/02 repealed and replaced by a decision which respected the order of procedure laid down in Regulation 1747/2002, whereas the Article 90 (2) complaint called for the decision of the Appointing Authority rejecting his application for “dégagement” for the 2003 exercise to be reviewed and re-examined in compliance with the letter and the spirit of Regulation 1747/2002. The Ombudsman notes, however, that the Council itself, in its decision rejecting this complaint, noted that the Article 90 (2) complaint covered both these aspects (6) .

1.6 In its opinion, the Council further argues that the Appointing Authority’s refusal to divulge personal data to the Joint Committee was never contested or even addressed by the complainant. The Ombudsman notes, however, that this refusal to grant access to the files of the applicant officials was raised in point 6 of the Article 90 (2) complaint and that the Council replied to this argument in point 5 of its decision rejecting this complaint.

1.7 In these circumstances, the Ombudsman concludes that the Council has not established its view according to which the complainant failed to exhaust the internal remedies at his disposal before turning to the Ombudsman.

1.8 In its opinion, the Council also refers to the fact that the complainant has pointed out that he is not presenting his complaint in the hope of being granted early retirement, apparently in order to support its submission that the complainant has failed to exhaust all internal remedies. It is not entirely clear what relevance the fact mentioned by the Council could have in this context. The Ombudsman considers it useful, however, to recall that a complainant does not need to have a specific interest in order to be able to lodge a complaint under Article 195 of the EC Treaty. It is sufficient for the complainant to allege an instance of maladministration on the part of a Community institution or body, as the complainant has done in the present case. The Ombudsman further notes that the complainant appears to be motivated by a desire to ensure that the administration of the Council works properly. In the Ombudsman’s view, the right of the complainant to turn to the Ombudsman can thus not be doubted.

1.9 In its decision rejecting the Article 90 (2) complaint, the Council informed the complainant of the possibility to file an appeal with the Court of First Instance. The Ombudsman considers that it would be useful if the Council could in future cases also inform its officials that they have the right to lodge a complaint with the European Ombudsman.

2 Failure properly to consult the Joint Committee

2.1 The complainant alleges that the Appointing Authority failed properly to consult the Joint Committee in this matter. In his view, Decision No 484/02 was in conflict with Regulation No 1747/2002 since it reversed the sequence of events, culminating in the list of beneficiaries of the “dégagement” being put to the Joint Committee last, effectively confronting the latter with a ‘fait accompli’ and leaving it no margin, or even means, of assessment. In this context, the complainant points out that the Joint Committee was denied access to the files of the officials



who had applied. In the complainant's view, the Joint Committee was thus rendered incapable of providing the Appointing Authority with a duly substantiated opinion on the list of officials to whom the termination-of-service measures could apply.

2.2 The Council takes the view that Decision No 484/02 was entirely in conformity with Regulation No 1747/2002, given that the list of officials was only adopted *after* consultation of the Joint Committee. It further submits that the Appointing Authority's refusal to divulge personal data concerning each and every applicant to the Joint Committee was absolutely justified in the light of Regulation No 45/2001 (7). The Council argues that it made an undertaking, under Article 11 of Regulation 45/2001, to the effect that the sole recipients of the data were the Appointing Authority and DG A I.

2.3 The Ombudsman notes that Article 8 of Decision No 484/02 provides that the list of the officials whose service is to be terminated is established *after* the Joint Committee has given its opinion or after the period foreseen for the submission of this opinion has expired. In these circumstances, the Council's view that Decision No 484/02 is in conformity with Regulation No 1747/2002, in so far as the consultation of the Joint Committee is concerned, appears to be correct. It follows that the complainant's claim that Decision No 484/02 should be repealed and replaced by a Decision which respects the order of procedure laid down in Regulation 1747/2002 cannot be sustained.

2.4 However, the Ombudsman notes that Article 3 (1) of Regulation No 1747/2002 obliges the Council to consult the Joint Committee before adopting the list of applicants whose service is to be terminated. This provision obviously aims at allowing the Joint Committee to express its views on the proposals submitted by the Appointing Authority so as to allow the latter to take them into account when deciding on the matter. The Ombudsman considers, however, that in order to be able to form and express its views in a useful way, the Joint Committee has to be in possession of all the relevant information. It is difficult to see how the committee could give its opinion on the draft list presented to it without having the possibility of consulting the files of the individual applicants. Without such possibility, the consultation of the Joint Committee would appear to amount to a mere formality.

2.5 The Ombudsman is perfectly aware of the fact that this entails access to personal data and that any such access can only be granted in conformity with the provisions of Regulation 45/2001. In its opinion, the Council argues that it gave an undertaking, under Article 11 of Regulation 45/2001, to the effect that the sole recipients of the data were the Appointing Authority and DG A I. The Ombudsman notes that Article 11 (1) (c) of Regulation 45/2001 obliges the person collecting personal data from a data subject to inform this data subject of "the recipients or categories of recipients of the data". The annex to Staff Note 157/2002 of 22 November 2002 to which the Council refers in this context accordingly informs applicants that the recipients of the data contained in their applications were to be "the Appointing Authority and DG A I". Neither this document nor Article 11 of Regulation 45/2001 refer to any "undertaking" not to disclose the relevant data to other persons. However, it appears reasonable to assume that such personal data can only be disclosed (and thus processed) if the conditions of Article 5 of Regulation 45/2001 are met. Article 5 provides that, apart from the case where the



data subject has unambiguously given his or her consent (lit. d), personal data can be processed inter alia where “processing is necessary for compliance with a legal obligation to which the controller is subject”. Given that Article 3 (1) of Regulation 1747/2002 obliges the Council to consult the Joint Committee, this last-mentioned provision of Regulation 45/2001 could be applicable. However, even if one were to assume that Regulation 45/2001 did not allow such disclosure, regard would need to be had to the fact that this would be due to the fact that the Council did not inform applicants that their personal data could be submitted to the Joint Committee. In that case, the Council would itself have created the obstacle to disclosure on which it wishes to rely.

2.6 The Ombudsman therefore concludes that by refusing to grant the Joint Committee access to the files of the individual applicants or by failing to ensure the possibility that such access could be granted, the Council failed to allow the Joint Committee to express its views on the proposals submitted by the Appointing Authority in a useful way. In his view, the Council thus failed properly to consult the Joint Committee. This constitutes an instance of maladministration.

3 Conclusion

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

By refusing to grant the Joint Committee access to the files of the individual applicants or by failing to ensure the possibility that such access could be granted, the Council failed to allow the Joint Committee to express its views on the proposals submitted by the Appointing Authority in a useful way. In his view, the Council thus failed properly to consult the Joint Committee. This constitutes an instance of maladministration.

3.2 The complainant points out that he is not hoping to achieve termination of service by his complaint but that he is trying to make the Council's administration face up to its responsibilities towards its staff. The Ombudsman believes that by making a critical remark, he contributes towards the improvement of the administrative activity of the Council and that such a critical remark thus corresponds to the intentions of the complainant. In these circumstances, the Ombudsman considers that it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

3.3 The Secretary General of the Council will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2002 no. L 264, p. 5.

(2) From the Council's decision on the Article 90 (2) complaint it emerges that this draft list was established by the Council's Deputy Secretary General with the assistance of three high-grade



officials (to whom the "dégagement" was not applicable).

(3) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of individual data by the Community institutions and bodies and on the free movement of such data (OJ 2001 No. L 8, p. 1).

(4) OJ 2002 no. L 264, p. 5.

(5) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, page 15.

(6) See the introductory paragraph of the Council's decision of 21 October 2003: "You further submit that Decision No 484/02 (...) should be repealed."

(7) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of individual data by the Community institutions and bodies and on the free movement of such data (OJ 2001 No. L 8, p. 1).