European Ombudsman

Decision of the European Ombudsman on complaint 429/2005/IP against the European Commission

Decision
Case 429/2005/IP - **Opened on** 04/03/2005 - **Decision on** 25/07/2007

Strasbourg, 25 July 2007
Dear Mr N.,

On 5 January 2005, you submitted a complaint to the European Ombudsman concerning the personnel policy of the Joint Research Centre of the European Commission in Ispra.

On 3 March 2005, I forwarded the complaint to the President of the Commission. The Commission sent the Italian translation of its opinion on 16 June 2005 and I forwarded it to you with an invitation to make observations, which you submitted to me on 3 August 2005.

By letter of 10 July 2006, I informed you that the examination of your case was ongoing and that I would notify you of the progress of your complaint as soon as possible. I pointed out that every effort would be made to provide this information by the end of September 2006. On 29 September 2006, I sent a letter to you explaining that I would need additional time to provide you with the relevant information.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time taken in order to conclude the present inquiry.

THE COMPLAINT

Background (1)
On 22 December 2000, the complainant, an Italian lawyer who complained on behalf of five clients, submitted a complaint to the European Ombudsman. The complaints (registered under complaint references 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP, 141/2001/IP) concerned the personnel policy of the Joint Research Centre of the Commission in Ispra (the "JRC").

In his complaints, the complainant alleged that the conditions laid down in Article 3 of the Conditions of Employment of other servants of the European Communities (2) (the "Conditions of Employment") had not been respected as regards his clients.

The complainant's clients had been recruited as auxiliary staff at the JRC between 1995 and 1996. Their first contracts were renewed for one year. Afterwards, they were all offered temporary staff contracts. After the initial duration of two years, the relevant temporary staff contracts were renewed for a period of one year.

According to the complainant, the initial auxiliary staff contracts should have been considered as temporary staff contracts. Consequently, the temporary staff contracts were, in reality, renewed twice (and not only once as maintained by the Commission).

In accordance with the last paragraph of Article 8 of the Conditions of Employment, " *[t]he contracts of temporary staff to whom Article 2(a) or Article 2(d) applies who are engaged for a fixed period may be renewed not more that once for a fixed period. Any further renewal shall be for an indefinite period.* " The complainant thus took the view that the contracts of his clients should have been transformed into indefinite contracts.

He further considered that the Commission had acted illegally by awarding a three-year contract of temporary staff to his clients since, in his view, this kind of contract should have been awarded only to persons who carried out technical or scientific functions. His clients had instead carried out administrative functions. The complainant further argued that, by limiting the length of the contracts of his clients to three years, the Commission had, *de facto* , prevented them from obtaining an indefinite contract.

The complainant also considered that the project of the *Nouvelle Politique du Personnel Recherche* (the "NPPR") should, in accordance with Article 110 of the Staff Regulations, have been submitted to the Staff Regulations Committee, since it provided for implementing provisions of the Staff Regulations. Furthermore, since the NPPR modified the Staff Regulations it should have been adopted by the Council as a Regulation. The complainant also considered that there were no reasons to have two categories of temporary staff, the first of them subject to non-renewable contracts with a duration of a maximum of three years (the complainant's clients had been in this category) and the second one involving five-year renewable contracts.

On 28 March 2001, the Ombudsman opened a joint inquiry and asked the Commission to provide an opinion on the complainant's complaints. From the Commission's opinion, forwarded to the Ombudsman on 23 May 2001, it emerged that the complainant had started legal proceedings before the Court of First Instance against the Commission on the same subject-matter.

On 7 June 2001, the Ombudsman therefore closed the cases on the basis of Article 195 of the EC Treaty according to which " *[t]he European Ombudsman may not conduct inquiries where the alleged facts are or have been the subject of legal proceedings* " and of Article 2(7) of the Ombudsman's Statute (3) , according to which " *[w]hen the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed definitively.* "

On 29 July 2003, the complainant sent his observations on the Commission's opinion concerning a sixth complaint (617/2003/IP) that he had, in the meanwhile, submitted to the Ombudsman. On the same date, he also sent a separate letter in which he mentioned that, on 1 April 2003, the Court of First Instance had declared the first five complaints inadmissible, because they had been lodged after the relevant deadline. On this basis, the complainant therefore asked the Ombudsman whether, since the Court had never dealt with the substantive aspects of the complaints lodged with it, the Ombudsman could reconsider the complaints made to him in December 2000, in case his clients wished to resubmit them. The complainant also drew the Ombudsman's attention to the fact that the original complaints had been made within the period of two years from the date on which the facts on which they had been based came to the attention of his clients (4) .

The Ombudsman considered that, since the Court of First Instance had never dealt with the substantive aspects of the complainants' complaints, there were, in principle, no reasons not to reconsider them. In a letter of 8 December 2004, the complainant was informed accordingly. On 5 January 2005, the complainant informed the Ombudsman that, on behalf of his clients, he wished that his complaints 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP, 141/2001/IP be reconsidered. The complainant's letter of 5 January 2005 was therefore registered as a new complaint under reference 429/2005/IP.
The present complaint
Since the complainant resubmitted exactly the same complaints as those sent in December 2000 (namely, cases 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP, 141/2001/IP), the Ombudsman opened a new inquiry maintaining the same wording of the opening letter sent to the Commission in those cases. The Commission was asked to provide an opinion on the complainant's allegation that the conditions laid down in Article 3 of the Conditions of Employment had not been respected when the institution recruited the complainant's clients.

THE INQUIRY

The Commission's opinion
In its opinion, the Commission made the following points:

The Commission first of all contested the competence of the Ombudsman to deal with the case on the basis of Article 1(3) of his Statute, which establishes that " *the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling* ".

The Commission pointed out that, on 1 April 2003, the Court of First Instance made an order concerning an application for annulment submitted by Ms Mascetti (5) ("the applicant"), one of the clients of the complainant. The applicant, a former member of the temporary staff of the Commission, asked the Court to annul the decision of 28 September 2000 by which the Appointing Authority rejected the Article 90(2) complaint that she had lodged on 27 March 2000. In this Article 90(2) complaint, the applicant sought a declaration that her employment relationship with the Commission was based on an indefinite contract and that she was considered as a member of the temporary staff, pursuant to Article 2(d) of the Conditions of Employment. According to the Court, the act adversely affecting the applicant was the

"additional clause" to the contract of employment (6) signed between the latter and the Commission by which the latter extended the original length of her contract (of two years) by one year. Since the applicant considered that her contract should have been transformed into an indefinite contract, she should have made her Article 90(2) complaint within a period of three months from the date of her acceptance of this "additional clause", that is, 13 July 1999. However, the Article 90(2) complaint was introduced only on 28 March 2000. In view of the above, the Court stated in its order that the applicant's action was dismissed as inadmissible.

Concerning the complainant's other four clients (Ms Ascatigno, Mr Benini, Mr Riva and Mr Rizzello), the Commission stated that, as far as it was aware, they had never complained to the Court of First Instance.

The Commission also contested the competence of the Ombudsman to deal with the present case on the basis of Article 2(4) of the Ombudsman's Statute, according to which " *a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint.* " The complainant submitted complaints 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP and 141/2001/IP on 22 December 2000. Since these complaints were closely linked to the nature of the contracts of auxiliary staff concluded between the complainants and the Commission in the years 1995 and 1996, the present complaint should have been rejected on the grounds that the relevant facts on which it was based came to the attention of the persons on whose behalf the complaint was made more than two years before the lodging of the complaint.

Nevertheless and without putting into question the above, the Commission stated that, in a spirit of good administration, it had decided to give a substantive reply to the complainant's allegations of maladministration and made the following points.

Concerning the complainant's argument that the contracts of auxiliary staff signed by his clients should have been qualified as contracts of temporary staff, the Commission confirmed the point of view already expressed in its reply of 28 September 2000 to the Article 90(2) complaints made by the complainant's clients. It pointed out that the complainant's clients had all been recruited in order to replace an official or a member of the temporary staff for a period during which the Commission was finalising the relevant recruitment procedure in order to fill vacant posts. They had therefore benefited from contracts of auxiliary staff according to the terms of Article 52(a) of the Conditions of Employment.

Regarding the complainant's argument that, in accordance with the last paragraph of Article 8 of the Conditions of Employment (7) , the renewal of the contract of temporary staff signed by his clients should have been one of indefinite duration, the Commission took the view that this argument was not grounded, since it was erroneous. The first contract signed by the complainant's clients was indeed an auxiliary staff contract and not a temporary staff contract. However, if the persons concerned considered that their auxiliary staff contracts should have been reclassified as temporary staff contracts, they should have submitted a complaint in accordance with Article 90(2) of the Staff Regulation. It appeared that none of them did so.

The complainant took the view that the NPPR was illegal, because, given that it modified the Staff Regulations and that it also provided for implementing provisions of the Staff Regulations, it should have been adopted by the Council. Further, the Commission should, *a fortiori* , have consulted the Staff Regulations Committee. The Commission contended that the complainant's argument was based on an erroneous assumption, since neither the Court of First Instance nor the Staff Regulations Committee had stated that the NPPR had been irregularly adopted.

The complainant finally considered that the NPPR did not respect the principle of non-discrimination in view of the fact that it had created two categories of temporary staff, those benefiting from a non-renewable contract of a maximum of three years' duration and those benefiting from a five-year renewable contract. In this regard, it had to be noted that discrimination exists when two identical situations are treated differently or when two different situations are treated identically. The Commission considered that the difference between the lengths of the two categories of temporary contracts in question was justified by objective reasons. Those agents who had benefited from a five-year renewable contract had participated in a more difficult selection procedure than those who had benefited from a three-year contract. The Commission finally stated that the complainant's clients were aware of the conditions of their contracts and that they had accepted them. Furthermore, these conditions were legal and corresponded to the interest of the service.

The complainant's observations

In his observations, the complainant disagreed with the Commission's view concerning the Ombudsman's mandate to deal with his case. In order to support his position, the complainant invoked Article 1(3) of the Statute of the Ombudsman, which establishes that " *the Ombudsman may not* intervene *in cases before courts or question the soundness of a court's ruling* " (emphasis added by complainant). According to the complainant, this provision was designed to prevent the Ombudsman from dealing with a complaint, the substance of which was before the courts or had been the subject of a court decision. In the present case, since the Court of First Instance had never dealt with the substance of the relevant case, there was no risk of violating the principle set out in Article 1(3) of the Ombudsman's Statute.

The complainant further expressed his surprise at the Commission's statement that, as far as it was aware, only one of his clients (on whose behalf he complained to the Ombudsman) had complained to the Court of First Instance. The complainant could not understand how the Commission had reached this conclusion since all the orders made by the Court of First Instance concerning the applications submitted by his clients had been published in the Official Journal.

Concerning the Commission's further argument that the Ombudsman was not competent to deal with his case on the basis of Article 2(4) of his Statute, according to which " *a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint* ", the complainant stated that, when complaints 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP and 141/2001/IP had been submitted to the Ombudsman, on 22 December 2000, the relevant period of two years had been respected.

Concerning the substance of his complaint, the complainant basically maintained his original

complaint.

THE DECISION

1 Preliminary remarks

1.1 The European Ombudsman notes that, in its opinion, the European Commission contested his mandate to deal with the present case, on the basis of Article 1(3) and of Article 2(4) of the Ombudsman's Statute.

1.2 Article 1(3) of the Statute of the Ombudsman establishes that " *the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling* ". Since, on 1 April 2003, the Court of First Instance made an order dismissing as inadmissible an application for annulment submitted by Ms Mascetti (8) (one of the clients of the complainant), the Commission considered that the Court had dealt with the case and that the Ombudsman was therefore not competent to deal with it.

In this regard, the Ombudsman maintains the point of view, already expressed in his letters of 8 December 2004 to the complainant and of 3 March 2005 to the President of the Commission, that, since the Court never dealt with the substantive aspects of the complaints submitted by the complainant's clients, there were, in accordance with the wording and the purpose of the rules set out in the Statute of the Ombudsman, no reasons for the Ombudsman not to deal with the complaints.

Concerning that Commission's statement that, as far as it was aware, only one out of the five complainant's clients on whom behalf he complained to the Ombudsman had complained to the Court of First Instance, the Ombudsman would like to emphasise that, as correctly pointed out by the complainant in his observations, it appears that such a statement was inaccurate. The Ombudsman notes that the five orders (9) of the Court were published in the Official Journal (OJ C 135 of 7 June 2003).

1.3 The Ombudsman notes that the Commission also contested his mandate to deal with the present case on the basis of Article 2(4) of the Statute of the Ombudsman, according to which " *a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint.* "

In this regard, the Ombudsman would like to note that, as already stated in his letter to the President of the Commission opening the present inquiry, the Ombudsman is aware that the facts at the origin of the complaint have taken place more that two years before the present complaint was lodged. However, having considered that complaints 95/2001/IP, 138/2001/IP, 139/2001/IP, 140/2001/IP and 141/2001/IP were lodged within the two-year time-limit, thus demonstrating the necessary diligence which the time-bar set out in Article 2(4) of the Statute of the Ombudsman seeks to assure, and that the relevant inquiry was only closed when the matters were submitted to the Court of First Instance, the Ombudsman took the view that it would not have been legitimate or appropriate to refrain from opening the present inquiry. The Ombudsman maintains his position.

The Ombudsman would like to add that, in accordance with Article 3(1) of the Statute of the Ombudsman " *[t]he Ombudsman shall, on his own initiative (...) conduct all the enquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies.* " In this case, the Ombudsman could have therefore had the possibility to close the complainant's case on the basis of Article 2(4) and then open an own-initiative inquiry if he had so wished. However, he also took that view that it would not have been appropriate to open an own-initiative inquiry, given that he considers his decision to proceed with an inquiry into the present complaint to be in accordance with his mandate.

1.4 The Ombudsman would, in any event, like to acknowledge and to welcome the fact that, despite its own opinion on the relevant issue, the Commission had provided him with an opinion on the substance of the allegations made by the complainant in the original complaints lodged with the Ombudsman in 2001 and then repeated in his letter of 5 January 2005, which had been registered as a new complaint under the reference 429/2005/IP.

1.5 In order to avoid possible misunderstanding, the Ombudsman would like to underline that, in his letter to the Commission opening the inquiry in the present case, the Ombudsman explicitly asked the Commission to give an opinion on the alleged failure to respect the conditions laid down in Article 3 of the Conditions of Employment of other servants of the European Communities (the "Conditions of Employment"). It appears that the complainant did not object to this interpretation of his complaint.

1.6 In these circumstances, the present decision is limited to the allegation set out in his opening letter to the Commission.

2 The alleged failure by the Commission to respect the conditions laid down in Article 3 of the Conditions of Employment

2.1 The complainant complained on behalf of his clients who had been recruited as auxiliary staff at the Joint Research Centre of the Commission in Ispra ("JRC") between 1995 and 1996. All of them had benefited from the maximum length of time (that is, one year) foreseen by the Conditions of Employment for this kind of contract. After this one year period, all the complainant's clients had benefited from temporary contracts. After the initial duration of two years, the relevant contracts had, in accordance with Article 8 of the Conditions of Employment, been renewed for a period of one year.

In his complaint to the Ombudsman, the complainant alleged that the conditions laid down in Article 3 of the Conditions of Employment had not been respected when the institution recruited the complainants.

In order to support his allegation, the complainant submitted that, in accordance with the terms of Article 2(d) of the Conditions of Employment, the initial contract of auxiliary staff offered to his clients should have been considered as a of temporary staff contract. According to the complainant, although his clients had been contracted as auxiliary staff they had, *de facto* , been temporary staff from the beginning of their contracts. When their contracts were transformed from auxiliary staff to temporary staff contracts, nothing changed in real terms. The

complainant's clients continued to carry out the same tasks, in the same offices, and under the authority of the same superiors.

Consequently, the temporary staff contracts of his clients were, in reality, renewed not once, but twice. In accordance with the last paragraph of Article 8 of the Conditions of Employment, " *the contracts of temporary staff to whom Article 2(a) or Article 2(d) applies who are engaged for a fixed period may be renewed not more that once for a fixed period. Any further renewal shall be for an indefinite period.* " The complainant took the view that the contract of his clients should have been transformed into indefinite contracts. He further considered that the Commission had acted illegally by awarding a three-year contract of temporary agents to his clients since, in his view, this kind of contract should have been awarded only to persons who carried out technical or scientific functions. His clients had instead carried out administrative functions. The complainant further argued that, by limiting the length of the contracts of his clients to three years, they had, *de facto* , been prevented from obtaining indefinite contracts.

2.2 In its opinion, the Commission stressed that the complainant's clients had all been recruited in order to replace an official or a member of the temporary staff for a period during which the Commission was finalising the relevant recruitment procedure in order to fill the vacant posts. They had therefore benefited from auxiliary staff contracts, in accordance with the terms of Article 52(a) of the Conditions of Employment.

Regarding the complainant's argument that the renewal of the temporary staff contract by his clients should, in accordance with the last paragraph of Article 8 of the Conditions of Employment (10) , have been for an indefinite period, the Commission took the view that this argument was erroneous. The first contract signed by the complainant's clients was indeed an auxiliary staff contract and not a temporary staff contract. However, if the persons concerned considered that their auxiliary staff contracts should have been reclassified as temporary contracts, they should have submitted a complaint in accordance with Article 90(2) of the Staff Regulation. It appeared that none of them did so.

2.3 In his observations, the complainant basically maintained the position that he expressed in his complaint.

2.4 The Ombudsman notes that, in accordance with Article 3 of the Conditions of Employment, an " *auxiliary staff* " contract can be offered " *for the performance of full-time or part-time duties in an institution but not assigned to a post included in the list of posts appended to the section of the budget relating to that institution* ". Alternatively, it can be offered to " *replace certain persons who are unable for the time being to perform their duties [...].* "

In accordance with Article 2 of the Conditions of Employment, "temporary staff" means:

" *(a) staff engaged to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary;*

(b) staff engaged to fill temporarily a permanent post included in the list of posts appended in the section of the budget relating to each institution;

(c) staff, other than officials to the Communities, engaged to assist either a person holding an office provided for in the Treaties establishing the Communities, or the Treaty establishing a Single Council and a Single Commission of the European Communities, or the elected President of one of the institutions or organs of the Communities or the Elected Chairman of one of the political groups in the European Parliament;

(d) staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned. "

In its opinion, the Commission stated that the complainant's clients had all been recruited in order " *to replace an official or a member of the temporary staff* ". If this actually was the case, the contracts of the complainant's clients were, at the relevant time, correctly classified as " *auxiliary staff* " contracts in line with the definition in Article 3 of the Conditions of Employment. This fact has not been contested by the complainant. Therefore, the Ombudsman has no reason to conclude that the opinion of the Commission is not accurate on this point.

The Ombudsman also takes note that, according to the complainant, the complainant's clients carried out, during their temporary staff contracts, the same tasks as those performed by them during their auxiliary staff contracts, in the same offices, and under the authority of the same superiors,. The Ombudsman notes that the classification of staff as either "auxiliary staff" or "temporary staff" does not necessarily imply that such staff will carry out different roles. Members of staff on auxiliary contracts may indeed carry out roles which are identical to the roles carried out by temporary staff. Indeed, the distinction between auxiliary staff contracts and temporary staff contracts is primarily based, not on the roles carried out by staff, but on the fact that whilst auxiliary staff contracts are used for staff that will not be assigned to specific "posts" foreseen in the establishment plan of the institution concerned and are paid from the appropriations foreseen in the budget for that purpose, temporary staff contracts are used for staff occupying posts which have already been created and are included in the establishment plan of the institution concerned. Therefore, even if the arguments put forward by the complainant as regards the similar roles carried out by his clients were correct, this would not necessarily imply that the Commission wrongly applied Article 3 of the Conditions of Employment when it recruited the complainant's clients as "auxiliary staff".

The Ombudsman therefore considers that there has been no maladministration by the Commission with respect to this aspect of the case.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the 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) All references made in the present decision to the Staff Regulations and to the Conditions of Employment of other servants of the European Communities are to be understood as referring to the legislation in force before 1 May 2004.

(2) Article 3 of the Conditions of Employment of other servants of the European Communities states that the term " *auxiliary staff* " means:

" *(a) staff engaged, within the limits set in Article 52, for the performance of full-time or part-time duties in an institution but not assigned to a post included in the list of posts appended to the section of the budget relating to that institution;*

(b) staff engaged, after the possibilities of temporary posting of officials within the institution have been examined, to replace certain persons who are unable for the time being to perform their duties [...] such staff [being] paid from the total appropriations for the purpose under the section of the budget relating to the institution. "

(3) OJ 2002 L 92, p. 13.

(4) However, when he wrote the letter in July 2003, asking the Ombudsman whether he could reconsider the five complaints closed on 7 June 2001, this period had already elapsed.

(5) Case T-11/01 *Mascetti v Commission* . The order of the Court of First Instance was published in the Official Journal (OJ 2003 C 135, p. 28).

(6) Entered into force on 1 November 1997.

(7) "The contracts of temporary staff to whom Article 2(a) or Article 2(d) applies who are engaged for a fixed period may be renewed not more than once for a fixed period. Any further renewal shall be for an indefinite period".

(8) Case T-11/01 *Mascetti v Commission* . The order of the Court of First Instance was published on the Official Journal (OJ 2003 C 135, p. 28).

(9) Order in Case T-11/01 *Mascetti v Commission* ; order in Case T-12/01 *Ascatigno Battistella v Commission* ; order in Case T-13/01 *Riva v Commission* ; order in Case T-13/01 *Rizzello v Commission* ; and order in Case T-15/01 *Benini v Commission* .

(10) "The contracts of temporary staff to whom Article 2 (a) or Article 2 (d) applies who are engaged for a fixed period may be renewed not more than once for a fixed period. Any further

renewal shall be for an indefinite period".