

Decision of the European Ombudsman on complaint 1104/2005/ELB against the European Commission

Decision

Case 1104/2005/ELB - Opened on 14/04/2005 - Decision on 10/07/2008

Strasbourg, 10 July 2008

Dear Mr P.,

On 15 March 2005, you submitted a complaint to the European Ombudsman against the European Commission concerning the appeal that you lodged with it on 10 January 2005 with respect to your entry step as a local agent (ALAT (1)) at its Delegation in Zimbabwe.

On 14 April 2005, I forwarded the complaint to the President of the Commission. At your request, my services met you on 28 April 2005 to discuss your complaint. The Commission sent its opinion on 26 July 2005. I forwarded it to you with an invitation to make observations, which you sent on 31 October and 14 November 2005.

On 13 February 2006, I requested further information from the Commission. The Commission sent its complementary comments on 12 June 2006. I forwarded them to you with an invitation to make observations, which you sent on 24 August 2006.

On 4 June 2007, I wrote to the President of the Commission seeking a friendly solution to your complaint. The Commission sent its reply on 11 October 2007. I forwarded it to you with an invitation to make observations, which you sent on 30 October 2007.

On 14 December 2007, I informed the Commission that I needed to inspect its file and, on 7 and 15 January 2008, my services carried out the inspection.

On 24 January 2008, I informed you of the inspection.

You sent additional documents and requested information on progress made with your complaint on 6 and 7 February, 26 June, 10 July, and 12 October 2006, as well as on 2 January, 17 April, 7 June, 3 and 25 September 2007.

I gave you information in relation to your complaint and its handling on 9 February, 3 and 31 May, 7 July, and 20 October 2006, as well as on 15 January, 14 May, 5 and 25 September and 7 November 2007.



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

Background to the complaint

The present complaint was preceded by another one from the same complainant, which can be summarised as follows.

Complaint 530/2003/ELB

The complaint concerns the level at which a local agent ("ALAT") was first employed at the Commission's Delegation in Zimbabwe ("the Delegation"). The complainant was informed by the desk officer for Zimbabwe that his entry level "step" (2) would be "step 4", despite the fact that "step 13" had been indicated to him when he accepted the oral offer of employment from the Delegation. He appealed to the Commission's Directorate-General for External Relations ("DG Relex"), but did not receive any reply. The complainant alleged that the Commission failed to answer his requests. He claimed that, in view of his working experience since 1980, his entry step should be step 13.

The European Ombudsman wrote twice to the Commission to propose a friendly solution. On 16 December 2004, the Ombudsman closed the case with the following two critical remarks (3) :

" The Commission asserts that it never received the complainant's appeal, despite the proof provided by the complainant that his appeal had been sent by diplomatic pouch on 4 February 2003. The complainant contacted the Commission by e-mail on 10 March 2003 requesting information on progress in dealing with his appeal. The Ombudsman regrets that the Commission has not seen fit to make any comment on this e-mail during the Ombudsman's inquiry. Principles of good administration require the institution to reply to correspondence. From the information available in the file, the Commission does not appear to have replied to the complainant's e-mail request. This is an instance of maladministration.

The Ombudsman takes the view that the Commission has not adequately justified its decision on the complainant's grading because, despite being given the opportunity to do so by the Ombudsman, the Commission has failed to answer the complainant's arguments to support his case for a higher grading. This is an instance of maladministration. The Ombudsman considers that the Commission's rejection of the possibility adequately to explain its position is even more blameworthy, given that the Commission is aware that the complainant has provided convincing evidence that he contested the grading through an appeal which, through no fault of the complainant, the Commission never received. "

In his decision, the Ombudsman advised the complainant to lodge a new appeal against his grading.

On 10 January 2005, the complainant sent an e-mail to the Commission, indicating that, as



advised by the Ombudsman, he was lodging a new appeal against the decision concerning his entry step as an ALAT and that the appeal would also be lodged by fax and diplomatic mail.

On 4 March 2005, in its reply to the complainant's appeal, the Commission explained that, according to Article 35 of the Specific Conditions of Employment of local staff serving in Zimbabwe and Article 22 of the Framework Rules (4), the Commission could not recognise his appeal, because the so-called appeal was made on 4 December 2002, before the terms of the contract of employment had been officially proposed by the Commission. The contract was signed afterwards and signing the contract would have given the complainant the possibility of submitting an appeal. However, he signed the contract without making any objection. The so-called appeal was thus only a preparatory document. The Commission further explained that, even though the so-called appeal could not be considered to constitute an appeal as such, the Commission replied to it in its comments to the Ombudsman. According to the applicable rules, an appeal should be submitted within three months after the date of the notification of the act adversely affecting the member of the local staff and the absence of a reply within three months should be deemed as an implicit rejection of the appeal. Consequently, a second appeal was not admissible. The Commission also informed the complainant that it would ask the Delegation to make a payment corresponding to the error of one step in the complainant's grading. It concluded by stating that acceptance of the complainant's request regarding his grading would imply a discriminatory treatment in relation to all other cases of recruitment.

The present complaint: 1104/2005/ELB

In his new complaint, the complainant alleged that the Commission failed to deal appropriately with his appeal dated 10 January 2005 as regards his entry step as an ALAT at the Delegation. He argued that he signed his contract, indicating that he was initiating an appeal. He considered that the Commission did not reply to the issues raised by the Ombudsman in his previous decision. He indicated that he lodged an appeal on 4 December 2002, that is, before the signature of his contract, and on 4 February and 10 March 2003, that is, after the signature of his contract and within the deadline stipulated in the applicable provisions. According to the complainant, the Commission never explained why the Delegation's proposal was rejected. He went on to clarify that the purpose of his appeal was to obtain from the Commission the justification of the interpretation of his professional experience, which had an influence in determining his entry step. Put otherwise, he wanted to know why 13 years of professional experience were not recognised and why the Delegation's proposal was rejected.

On 14 April 2005, the Ombudsman opened an inquiry into the complaint. In his opening letter, he also asked the Commission to comment on the critical remark made in complaint 530/2003/ELB that the Commission had failed to reply to the point concerning the appeal lodged by the complainant by diplomatic pouch on 4 February 2003.

THE INQUIRY

On 26 July 2005, the Commission sent its opinion on the complaint, stating that it would be willing to examine the complainant's claims on their merits, taking into account any new elements, proof or arguments which were not considered during the previous stages of the



procedure. Therefore, when he informed the complainant of the Commission's opinion, the Ombudsman invited him to take advantage of this offer and to submit all elements that he wished the Commission to take account of. On 31 October 2005 and 14 November 2005, the complainant sent his observations on the opinion.

On 13 February 2006, after careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman made further inquiries. In its letter to the Commission, he noted that, in its opinion, the latter indicated its willingness to examine, as an *ex gratia* measure, the complainant's claims on the merits and, to this end, the Commission asked the Ombudsman for (i) the complainant's mail sent on 4 February 2003 and (ii) any new information which was not considered during the previous stages of the procedure. Since it was not sufficiently clear what kind of information the Commission had already examined during the previous stages of the procedure, the Ombudsman took the view that it would be appropriate to send all the materials (5) that might be pertinent to the Commission's re-examination of the issue.

On 12 June 2006, the Commission sent its additional comments.

On 24 August 2006, the complainant sent his observations.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the Commission's opinions and the complainant's observations, the Ombudsman did not consider that the Commission had responded adequately to the complainant's allegations and claim.

The proposal for a friendly solution

In accordance with Article 3(5) of his Statute, the Ombudsman therefore wrote to the President of the Commission to propose a friendly solution.

The Ombudsman recalled that, in its opinion on the complaint, the Commission offered to examine, as an *ex gratia* measure, the complainant's claims on the merits. He welcomed the constructive approach suggested by the Commission in its opinion. However, the Ombudsman noted that, notwithstanding that offer, the Commission had persisted in its views.

The Ombudsman suggested that the Commission could consider re-examining its decision concerning the determination of the complainant's entry step and the explanations it had provided in support of this decision.

This proposal was based in summary on the following preliminary conclusions:

Allegation that the Commission failed to deal appropriately with the complainant's appeal

The procedural issue

1 On 5 November 2002, the Delegation wrote to the Commission's headquarters, indicating that it had finalised its recruitment procedure for the ALAT post of a Regional Food Security Expert



and that one candidate, that is, the complainant, was clearly the most qualified and competent candidate with more than 27 years of professional experience. It proposed to grade the complainant at the highest step in the ALAT salary scale, taking his extensive experience into consideration.

On 4 December 2002, the complainant sent a fax to the Commission, stating that he had been informed that the agreed step entry would be step 4 and not step 13 as proposed by the Delegation because part of his professional experience was not considered to be relevant. He asked to be informed of the rationale underpinning this decision.

On 12 December 2002, the complainant sent another fax to the Commission, stating that he had signed his contract and, on 4 December 2002, had appealed, by fax, to DG Relex with respect to the salary step.

On 3 February 2003, the complainant sent an e-mail to the Commission, recalling that he had appealed the decision concerning his grading step and would submit his appeal also by diplomatic pouch.

On 4 February 2003, the complainant sent, by diplomatic pouch, a letter to DG Relex.

On 10 March 2003, the complainant sent another e-mail to the Commission, asking why he had received no acknowledgement of receipt of his communications.

2 On 19 March 2003, the complainant lodged a complaint with the Ombudsman (530/2003/ELB).

After having made two proposals for a friendly solution, which the Commission rejected on 16 December 2004, the Ombudsman closed his inquiry into complaint 530/2003/ELB, making the following critical remark:

" The Commission asserts that it never received the complainant's appeal, despite the proof provided by the complainant that his appeal had been sent by diplomatic pouch on 4 February 2003. The complainant contacted the Commission by e-mail on 10 March 2003 requesting information on progress in dealing with his appeal. The Ombudsman regrets that the Commission has not seen fit to make any comment on this e-mail during the Ombudsman's inquiry. Principles of good administration require the institution to reply to correspondence. From the information available in the file, the Commission does not appear to have replied to the complainant's e-mail request. This is an instance of maladministration. "

The Ombudsman suggested that, on the basis of the decision on complaint 530/2003/ELB, the complainant could make a new appeal to the Commission against his grading.

3 On 10 January 2005, following the Ombudsman's advice, the complainant lodged a new appeal against his grading by e-mail.



On 27 January 2005, the Commission acknowledged receipt of the complainant's e-mail.

On 4 March 2005, the Commission replied to the complainant's new appeal. It underlined that the possibility of making an appeal was foreseen in Article 14 of the complainant's contract of employment, which was in accordance with Article 35 of the Specific Conditions of Employment of local staff serving in Zimbabwe and Article 22 of the Framework Rules. The Commission could not recognise his claim as an appeal in due and good form, because it was made on 4 December 2002, before the terms of the contract of employment had been officially proposed to him. In accordance with Article 35 of the Specific Conditions of Employment of local staff serving in Zimbabwe, (i) an appeal should be submitted within three months of the date of the notification of the act adversely affecting the member of the local staff and (ii) the absence of a reply by the Authority empowered to conclude contracts ("AECC") within three months shall be deemed as an implicit rejection of the appeal. Taking these considerations into account, a second 'appeal' was, as a consequence, not admissible on this ground by the Commission.

4 In his new complaint dated 8 March 2005, the complainant alleged that the Commission failed to deal appropriately with his appeal, dated 10 January 2005, regarding his entry step as an ALAT at the Delegation.

In its opinion on the complaint dated 26 July 2005, the Commission regretted that it had not received the appeal submitted by the complainant. The Commission drew attention to the fact that, although the complainant had not received a decision from the Commission within three months of the date when the appeal was lodged, he failed to take action through the local courts.

In his observations dated 31 October and 14 November 2005, the complainant pointed out that the fact that the appeal was registered for diplomatic transmission meant that DG Relex assumed responsibility for this document upon registration. In any event, the complainant took the precaution of respectively informing, by way of e-mails dated 3 February 2003 and 10 March 2003, both the Head of Unit and the desk officer of his appeal. He attached copies of the appeal to these e-mails.

In its further reply dated 12 June 2006, the Commission stated that, by accepting to review the complainant's file, it acknowledged that the fact that the so-called appeal that the complainant claimed to have placed in the diplomatic pouch was never received by the headquarters could have created a difficulty for the complainant. It also remarked that the complainant had not availed himself of the other legal possibilities open to him to place his appeal.

In his observations dated 24 August 2006, the complainant stated that the Commission had always maintained that it never received his appeal and that his acceptance of the ALAT post was unconditional. He added that this argument had been contradicted by irrefutable proof.

5 The Ombudsman noted that the way the Commission had, from a procedural point of view, dealt with the complainant's appeal of 10 January 2005 was connected to its procedural analysis and handling of the complainant's requests contained in the following communications



he had sent to the Commission: (i) a fax of 4 December 2002, (ii) a fax of 12 December 2002, (iii) an e-mail of 3 February 2003, (iv) a letter sent by diplomatic pouch on 4 February 2003, and (v) an e-mail of 10 March 2003. The Ombudsman, thus, considered it appropriate to examine, first, the latter aspect of the case, namely, the Commission's procedural analysis and handling of the complainant's above-mentioned requests.

6 By his fax of 4 December 2002 to the Commission, the complainant expressed his astonishment at the information he had received about the Commission's assessment of his entry step. He also asked the Commission to provide him adequate reasons for this assessment, after taking properly into account his relevant arguments. By fax of 12 December 2002, the complainant informed the Commission that he had signed his ALAT contract, which was to enter into force at the beginning of 2003. He also stated that he had already appealed against the provision of the contract concerning his entry step. Although the complainant's objection to this contractual provision was not included in the contract, it should have been clear to the Commission that the complainant signed his contract while requesting the institution to reconsider and modify its decision regarding his entry step, as this decision was reflected in the contractual provision about this matter. Hence, the Commission's argument that the complainant accepted its proposal of an ALAT contract placing him in step 4, without objecting to it, was not well founded. Besides, even assuming that the complainant's initial request was not "*an appeal in good and due form*", as argued by the Commission, the complainant explicitly stated that he maintained it and, in essence, renewed it, immediately after he had signed his contract. Relatedly, it was recalled that the Commission itself had accepted that the complainant's signing of the contract would have given him the possibility to submit an appeal in good and due form.

The Ombudsman considered that it should have been clear to the Commission that the complainant had availed himself of this possibility when he sent his fax of 12 December 2002 and his subsequent letters. On 3 February 2003, that is, after the entry into force of the contract and within the three-month period from the date the complainant was informed of the Commission's decision about his entry step, the complainant sent an e-mail to the Commission, reminding it of his pending request/appeal concerning his entry step. The complainant also sent to the Commission letters about the issue in question on 4 February 2003, by diplomatic pouch, and on 10 March 2003, by e-mail. Nevertheless, the Commission ignored all these letters sent by the complainant and dealt with his challenge regarding his entry step only after the Ombudsman had opened his inquiry into complaint 530/2003/ELB. The fact that, under the applicable rules, the expiry of the deadline for a reply implied a rejection decision, was meant to establish a possibility of legal remedy for a citizen, and did not relieve the Administration of its obligation to provide a reasoned reply within the relevant deadline and, in particular, to provide the citizen, in cases like the present one, with adequate grounds for its challenged decision. In light of the above and of his first critical remark and relevant considerations in case 530/2003/ELB, the Ombudsman concluded that the Commission had not given satisfactory explanations, based on the relevant applicable rules, for its handling, from a procedural point of view, of the complainant's requests referred to in point 5 above.

7 The Ombudsman also recalled his second critical remark in case 530/2003/ELB. There he



took the view that the Commission had not adequately justified its decision on the complainant's grading because, despite being given the opportunity to do so by the Ombudsman, it had failed to answer the arguments put forward by the complainant to support his case for a higher grading.

8 Following the Commission's failure to deal with the matter properly, both from a procedural and a substantive point of view, the Ombudsman suggested, in his closing decision on complaint 530/2003/ELB, that the complainant could make a new appeal against his grading. The complainant lodged such an appeal with the Commission on 10 January 2005.

9 In its decision on this appeal, the Commission:

- reiterated its position that the complainant's fax of 4 December 2002, was not an appeal in good and due form;
- noted that it had already replied de facto to this so-called 'appeal' through its comments on complaint 530/2003/ELB;
- referred to the rules concerning the deadline for an appeal or for a decision on it, including the one about an implied rejection after the deadline for a decision had expired, and drew the conclusion that a second 'appeal' was not admissible;
- remarked that no new facts had emerged;
- considered that the Ombudsman's first critical remark in case 530/2003/ELB was not justified.

In this regard, the Ombudsman recalled his observations in points 6 - 8 above. Moreover, since, in the context of the present inquiry, the Commission accepted to re-examine the complainant's substantive claims about its assessment of his entry step, the Ombudsman concluded that no further inquiry into, and consideration of, the Commission's handling, from a procedural point of view, of the complainant's appeal of 10 January 2005 was justified.

The substantive issue

10 On 4 December 2002, the complainant was informed that the entry step for his ALAT contract was step 4. He challenged the grading, considering that all of his previous professional experience was relevant to the post at the Delegation.

On 19 March 2003, the complainant lodged complaint 530/2003/ELB with the Ombudsman, indicating that his experience and service since 1980 had already been certified as relevant for the purpose of determining his entry step under previous Commission contracts and that, since 1980, he had been dealing with food aid and food security issues.

In its opinion dated 14 July 2003, the Commission submitted the following arguments. The complainant was recruited at the Delegation on January 2003 as a member of the administrative and technical local staff ("ALAT"). In this post, the complainant was to receive a gross monthly basis salary based on six years and three months of specific professional experience corresponding to group I, step 4 of the reference salary scale applicable to the recruitment of ALATs in Zimbabwe. The only previous work experience of the complainant which could be taken into account was that which was related to the level of the post and the duties of the post in question. The post for which the complainant applied was a Group I post. These posts involved administrative, advisory and supervisory duties in different areas. For duties of this



kind, a university degree or equivalent professional experience was usually required. The complainant did not have a university degree, thus the only professional experience which could be taken into account was that which could be regarded as being equivalent to those involving administrative or advisory duties in the relevant area. Most of his professional experience was equivalent not to Group I but to Group II (equivalent to auxiliary agents in Category B). For this reason, only part of his experience could be taken into account for the post.

In his observations on the Commission's opinion, the complainant rejected the Commission's assertion according to which most of his professional experience was equivalent to Group II and not to Group I duties. He argued that his service at the Commission was relevant for his ALAT post because:

- Service as National Expert (1991-1994) corresponded to an A-Category post or a Group I ALAT post. All of this service was in the Food Aid/Food Security Unit in DG Development and was therefore directly relevant to the ALAT post at the Delegation. Then the same Unit recruited him for a further six months as an auxiliary agent of B-Category.
- From August 1994 to 1996, he co-ordinated Commission food aid and food security interventions.
- Since 1999, he has been employed by the Commission specifically to supervise staff and co-ordinate food aid and food security programmes.
- With regard to his civil service experience outside the Commission,
- since 1980, all of his duties as an Executive Officer ("EO") and a Higher Executive Officer ("HEO") in the Irish Department of Agriculture and Food involved senior administrative and supervisory work. This was recognised by the Commission as "reckonable" for A-Category posts.
- As EO and HEO, he served in areas that have a direct relevance to the management of the Common Agricultural Policy.

In his friendly solution proposal, dated 17 December 2003, the Ombudsman suggested that the Commission could re-examine the complainant's professional experience when assessing his entry step as an ALAT. In reply to this proposal, the Commission stated that it had taken into account his relevant experience in the field of food security, as could be seen in the following table:

Calculation of pertinent professional experience for the vacant post (calculation of step) Annex

1A

FROM

TO

EMPLOYER

FUNCTION

EXPERIENCE FOR STEP GRADING



Taken into consideration

Not taken into consideration

DATE

DATE

MONTHS

DAY

MONTH

DAY

1/02/1991

31/01/1994

Department of Agriculture and Food

National expert

36

0

0

0

1/02/1994

31/07/1994

Auxiliary agent B - DG Development

European Union

6

10



0

0

0

1/03/1999

29/02/2000

Auxiliary agent B - SCR (AIDCO)

European Union

12

0

0

0

1/03/2000

28/02/2001

Auxiliary agent A - SCR (AIDCO)

European Union

12

0

0

0

1/03/2001

30/11/2002

Technical assistant

Delegation Kiev

11



21

0

0

0

Sum

87

Steps calculated according to the working groups (I, II, III, IV, V, VI)

5 (6)

In his observations on the Commission's reply to the friendly solution, the complainant noted that the Commission provided no explanation as to why his other experience had not been taken into account.

In his second proposal for a friendly solution, dated 2 August 2004, the Ombudsman suggested again that the Commission re-examine the complainant's professional experience for assessing his entry step as an ALAT. In reply to this proposal, the Commission maintained its position.

In his observations on the Commission's reply, dated 1 October 2004, the complainant again asked for explanations from the Commission.

On 16 December 2004, the Ombudsman closed his inquiry into complaint 530/2003/ELB, making the following critical remark:

" The Ombudsman takes the view that the Commission has not adequately justified its decision on the complainant's grading because, despite being given the opportunity to do so by the Ombudsman, the Commission has failed to answer the complainant's arguments to support his case for a higher grading. This is an instance of maladministration. The Ombudsman considers that the Commission's rejection of the possibility adequately to explain its position is even more blameworthy, given that the Commission is aware that the complainant has provided convincing evidence that he contested the grading through an appeal which, through no fault of the complainant, the Commission never received. "

11 In the present complaint, the complainant alleged that the Commission failed to deal appropriately with his appeal dated 10 January 2005 concerning his entry step as an ALAT at the Delegation. He asked the Commission to justify its interpretation of his professional experience and its rejection of the Delegation's proposal.

12



In its further opinion dated 12 June 2006, the Commission stated that, after examining the documentation attached to the Ombudsman's request, the Commission noticed that it did not bring to light any new facts that it had not already considered during the previous phase of the procedure. It added that the following experience could not be taken into account:

- The complainant's experience between 1973 and 1991 in the Irish Department of Agriculture, because he had worked in assistant level positions in fields that the Commission did not consider relevant to the post at the Delegation;
- Two years as a self-employed consultant between 1994 and 1996 because the Commission did not have "any proof of element on the content" of the complainant's work;
- Two years in the Irish Department of Agriculture between 1996 and 1998 because the Commission was not provided "with any elements" concerning the tasks or the functions of the complainant during that period.

In his final observations dated 24 August 2006, the complainant accepted that the onus was on the candidate to prove "reckonable service" and argued that every effort had been made to do so. He conceded that his service in the grades of Clerical Officer and Staff Officer (amounting to a total of seven years) in the Irish Department of Agriculture could be regarded as not relevant. However, he maintained that the rest of his professional experience was relevant and did not accept that the Commission was not given any evidence of his tasks for the period 1996-1998.

12 The Ombudsman, first, noted that the complainant had not contested the Commission's position that, pursuant to the applicable rules, his professional experience which could be taken into account for the determination of his entry step was only the experience related to the level of the post and the duties it involved. Thus, only experience gained at a level involving the exercise of administrative or advisory duties in the specific field of food security comparable to the level of the relevant post and the duties it involved were relevant in determining the complainant's entry step. The complainant had also accepted that he bore the burden of providing proof of such experience. Hence, these points did not seem to be in dispute.

13 The Ombudsman further noted that the following periods and kinds of professional experience, referred to in the complainant's CV, were not taken into account by the Commission in connection with determining of the complainant's entry step:

- 1973 to 1979: Clerical Officer (Personnel and Export Refunds Unit) at the Irish Department of Agriculture and Food;
- 1979 to 1980: Staff Officer (Farm Modernisation Division) at the Irish Department of Agriculture and Food;
- 1980 to 1990: Executive Officer (Development Division and Oils and Fats Division) at the Irish Department of Agriculture and Food;
- 1990 to 1991: Higher Executive Officer (Processed Products Division) at the Irish Department of Agriculture and Food;
- 1994 to 1996: Consultant, hired by the Commission and private companies, to implement projects in Angola, Ethiopia and the Horn of Africa;
- 1996 to 1998: Higher Executive Officer (Intervention Operations Division in charge of the storage of intervention beef bought during the BSE crisis) at the Irish Department of Agriculture and Food;



- 1998 (three months): co-ordinator of emergency medical assistance for the victims of an earthquake in Afghanistan;
- 1998 to 1999: Higher Executive Office (Beef Policy Division) at the Irish Department of Agriculture and Food.

14 The Ombudsman recalled that the Commission considered that periods (1), (2), (3) and (4) could not be taken into account, because the complainant worked at assistance levels in fields not relevant to the post in question.

As regards periods (1) and (2), the complainant accepted, in a spirit of compromise, that they could be deemed ineligible.

As regards periods (3) and (4), the complainant did not accept the Commission's assessment. He argued that this experience was directly relevant to the post in the Delegation and was at the management level. Moreover, it was considered as relevant for the post in the Food Aid Unit of DG Development. In addition, the same periods were taken into account for other posts the complainant held within the Commission, namely, in DG Administration and DG Relex.

The Ombudsman first noted that, according to settled case-law of the Community Courts, the statement of reasons required by Article 190 of the EC Treaty must be appropriate to the act at issue. The case-law also provides that such a statement of reasons must disclose, in a clear and unequivocal fashion, the reasoning followed by the institution which adopted the measure in question. This should be done in such a way as to enable the persons concerned to ascertain the reasons for the measure and to facilitate its review. The requirements to be satisfied by the statement of reasons depended on the circumstances of each case, and, in particular, the content of the measure in question; the nature of the reasons given; and the interest which the addressees of the measure, or other parties to whom it was of direct and individual concern, may have in obtaining explanations (7) .

In relation to the above, the complainant asked for detailed reasons explaining how his entry step had been determined. However, the Commission did not explain why the information and supporting documentation provided by the complainant in relation to his professional experience led it to the conclusion that, during periods (3) and (4), he worked at assistance level in fields not relevant to the post in question. The complainant insisted that his experience during these periods was directly relevant to the post in the Delegation and was at the management level. He thus had a particular interest in obtaining these explanations. Moreover, without such explanations, the Ombudsman was not well positioned to review the reasonableness of the Commission's above conclusion, the propriety of which did not seem to be readily apparent. Under these circumstances, the Commission's failure to provide these explanations could constitute a potential instance of maladministration.

15 With regard to period (5), the Commission argued that it had no proof of the content of the complainant's experience during these years.

The complainant pointed out that his CV clearly indicated that he had spent most of this time



working for a company to which the Commission had assigned the task of controlling food movement in Ethiopia.

The Ombudsman noted that the complainant had accepted that he bore the burden of proof when it came to demonstrating his professional experience. While the complainant described his professional experience in his CV, the Ombudsman noted that he had not produced any evidence, such as copies of employment contracts or letters from his employers, to prove that the description of his professional experience was accurate. He had thus not submitted adequate evidence of the professional experience he claimed to have acquired during period (5). As such, the Ombudsman agreed that the Commission's view that it had no proof of the content of the complainant's experience during period (5) was reasonable.

16 With regard to period (6), the Commission argued that it had not been provided "with any elements" concerning the tasks or functions of the complainant during this period.

The complainant stressed that his CV included information on his experience during the period at issue.

The Ombudsman noted that this information was indeed found in the complainant's CV attached to complaint 530/2003/ELB. Moreover, the complainant's CV appeared to have been at the disposal of the Commission already on 5 November 2002, when the Delegation proposed to the Commission's headquarters to hire the complainant. The complainant's CV and information on his above experience clearly contained a reference to his function during the period at issue, namely, that he was "*in charge of the storage of intervention beef bought in during the BSE crisis*". Hence, the Commission's argument that it had not been provided "with any elements" concerning the tasks or functions of the complainant during this period did not seem to explain satisfactorily its decision not to take period (6) into account for the establishment of his entry step. This was a potential instance of maladministration.

17 With regard to periods (7) and (8), the complainant again made reference to his CV and quoted its relevant passages. The Commission did not comment on these periods and did not explain the reason(s) for its decision not to take them into account for the establishment of the complainant's entry step. As the Commission did not specifically refer to these periods, the Ombudsman considered that the Commission had not provided a satisfactory explanation for not taking them into account. This was also a potential instance of maladministration and, for these reasons, the Ombudsman made a friendly solution proposal.

In a further correspondence dated 7 June 2007, the complainant thanked the Ombudsman for his work on his complaint. He repeated that, as regards period (5), his contracts during this period were of direct relevance to food aid/food security management especially consistent with his ALAT post. The proof and details of his contracts during this period were already a matter of record. For the ALAT posting he was never requested to justify the details of his CV by providing certificates. He considered that the Commission took a unilateral decision as regards his entry step. Only after his appointment as ALAT and after having been assigned, nine months later, to a post of technical assistant doing the same job, was he asked to re-submit all



employment certifications, which he did. His experience during period (5) was accepted by the Commission as relevant for the Technical Assistant post. He stated that all of his certifications were on his recruitment dossier.

The Commission's reply to the Ombudsman's proposal for a friendly solution

In reply to the Ombudsman's proposal, the Commission made the following points:

The offer made by the Commission to examine the claim as an "ex gratia measure" was made in its comments of 26 July 2005 but was conditional on the complainant's putting forward new matters of fact, or new arguments, which had not been raised during the previous stages of the procedure.

In its comments of 12 June 2006, the Commission explained that the period between 1980 and 1990 in the Irish Department of Agriculture had not been taken into account as relevant professional experience for the post because, as had been the case for the period 1996-1999, it was merely referred to in the CV, without any supporting evidence.

Since the complainant did not produce any new material, there was no basis on which the Commission could reconsider its decision.

Throughout this matter, the Commission considered that it had examined all aspects of the case which had been questioned and had given full answers to the Ombudsman. It had tried to go beyond purely legal considerations and had shown its willingness to consider an ex gratia solution. However, an exceptional measure of that kind could not be taken unless the circumstances themselves were in some way exceptional. The Commission gave the complainant every opportunity to put forward reasons for considering that this might be so, but was obliged to conclude that he had not produced such reasons. It repeated that the decision on the entry step of the complainant was fully in accordance with the applicable rules, which have been applied in the same way to others in the same situation.

The complainants' observations on the Commission's reply

The complainants' observations can be summarised as follows:

The complainant considered that the Commission had decided to ignore both the facts and the proof, which he had, on several occasions, made available to the Commission.

On 7 November 2007, the Ombudsman's services contacted the complainant to check their understanding of his position, that is, that the Commission had in its possession his CV as well as all supporting documents. The complainant indicated that he provided supporting documents on several occasions to the Delegations in Harare and Kiev and to other Commission services.

Further inquiries

After careful consideration of the Commission's opinions and the complainant's observations, the Ombudsman considered that an inspection of the file relating to the complainant was necessary.

The inspection of the file

On 7 and 15 January 2008, the Ombudsman's services inspected the Commission's files relating to the complainant.



THE DECISION

1 Preliminary remark

1.1 On numerous occasions, the complainant pointed to the lateness of the European Commission's replies to the European Ombudsman. The Ombudsman would like to recall that the co-operation of the Community institutions and bodies in respecting deadlines is of fundamental importance in enabling the Ombudsman to deal with complaints promptly and effectively and thereby to fulfil his mission of enhancing relations between the citizens and the Community institutions and bodies. Furthermore, avoidable delay is contrary to the principles of good administration (8) . When, in a particular case, an institution cannot meet a deadline, the Ombudsman normally responds positively to a request for an extension of the deadline to a specific date, provided that the request is reasoned and is made before the expiry of the original deadline.

2 Allegation that the Commission failed to deal appropriately with the complainant's appeal

2.1 The complainant was recruited as a local agent ("ALAT") at the Commission's Delegation in Zimbabwe ("the Delegation"). He was informed by the desk officer for Zimbabwe that his entry step would be step 4, while step 13 had been indicated to him when he accepted the oral offer of employment from the Delegation. He appealed to the Commission's Directorate-General for External Relations ("DG Relex"), but did not get any reply. The complainant lodged a complaint with the Ombudsman about this issue (complaint 530/2003/ELB). The Ombudsman closed the case with two critical remarks about the Commission's failure to reply to the complainant's e-mail dated 10 March 2003 and its failure adequately to justify its decision concerning the complainant's grading. He advised the complainant to lodge a new appeal.

In the present complaint, the complainant alleged that the Commission failed to deal appropriately with his appeal dated 10 January 2005 as regards his entry step as an ALAT at the Delegation.

The Ombudsman recalls that this allegation involves two issues: the procedural and the substantive one. As regards the procedural issue, the Ombudsman refers to his finding contained in paragraph 9 of his friendly solution proposal, according to which no further inquiry into, and consideration of, the Commission's handling, from a procedural point of view, of the complainant's appeal of 10 January 2005 was justified.

Therefore, the present decision would only deal with the substantive issue.

2.2 On 4 June 2007, the Ombudsman made a friendly solution proposal to the Commission that it could consider re-examining its decision concerning the determination of the complainant's entry step and the explanations it had provided in support of this decision. The friendly solution proposal was based on an analysis which was presented on pages 5 to 16 above.

2.3 In reply, the Commission stated that, in its comments of 12 June 2006, it explained that the period between 1980 and 1990 and the period 1996-1999, when the complainant worked in the



Irish Department of Agriculture, had not been taken into account as relevant professional experience for the post because they were merely referred to in the CV, with no supporting evidence.

2.4 In his observations, the complainant repeated again that, on several occasions, he had provided the Commission with proof of his professional experience.

2.5 The Ombudsman notes that the following periods and kinds of professional experience, referred to in the complainant's CV, were not taken into account by the Commission when determining his entry step:

- 1973 to 1979: Clerical Officer (Personnel and Export Refunds Unit) at the Irish Department of Agriculture and Food;
- 1979 to 1980: Staff Officer (Farm Modernisation Division) at the Irish Department of Agriculture and Food;
- 1980 to 1990: Executive Officer (Development Division and Oils and Fats Division) at the Irish Department of Agriculture and Food;
- 1990 to 1991: Higher Executive Officer (Processed Products Division) at the Irish Department of Agriculture and Food;
- 1994 to 1996: Consultant, hired by the Commission and private companies, to implement projects in Angola, Ethiopia and the Horn of Africa;
- 1996 to 1998: Higher Executive Officer (Intervention Operations Division in charge of the storage of intervention beef bought in during the BSE crisis) at the Irish Department of Agriculture and Food;
- 1998 (three months): co-ordinator of emergency medical assistance for the victims of an earthquake in Afghanistan;
- 1998 to 1999: Higher Executive Office (Beef Policy Division) at the Irish Department of Agriculture and Food.

2.6 The Ombudsman recalls that the complainant agreed that periods (1) and (2) should not be taken into account.

As regards periods (3), (4) and (8), the Commission explained that these periods were not taken into account because the complainant provided no supporting documents. During the inspection of the Commission's file, the Ombudsman's services found a certified copy concerning the complainant's employment record delivered by the Irish Department of Agriculture and Food. However, this document provides no detailed information on the complainant's tasks during these periods and on their relevance for the post at the Delegation.

As regards period (5), the Ombudsman already considered that the Commission was right not to take it into account (see point 15 of the friendly solution proposal).

As regards periods (6) and (7), the inspection also showed that the Commission did not have at its disposal supporting evidence demonstrating that the complainant's professional experience during these periods was relevant to the post in question.



2.7 The Ombudsman recalls that the complainant indicated that, on several occasions, he had provided all supporting documents to the Commission. However, he did not provide these documents to the Ombudsman. Having inspected the Commission's files and in the absence of these documents, the Ombudsman concludes that there appear to be no grounds for further inquiries into the complaint.

2.8 The Ombudsman regrets the length of time the present inquiry has taken and considers that it could have been shorter if, from the beginning of the inquiry, the Commission had stated that its position was based on the fact that the complainant had not provided sufficient supporting documents to prove his professional experience.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appear to be no grounds for further inquiries into the complaint. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) "ALAT" stands for the French term: "*Agent Local d'Assistance Administrative et Technique*".

(2) Local agents are subdivided into function groups corresponding to the duties to be performed. Each function group is divided into steps, corresponding to the number of years of professional experience.

(3) On 25 February 2005, the Commission sent the Ombudsman comments on the critical remarks.

(4) Article 22 of the Framework Rules states the following:

"A member of local staff may submit an appeal to the authority empowered to conclude contracts of employment against an act adversely affecting him within three months of the date of publication of the act if the measure is of general application, or within three months of the date of notification to the member of local staff concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person. Appeals shall be submitted to the authority empowered to conclude contracts of employment through the immediate superior of the member of local staff, except where it concerns that person, in which case it may be submitted direct to the authority next above." (Administrative Notice, 22 June 1990).

(5) The Ombudsman sent the following documents to the Commission: complaint 530/2003/ELB; the complainant's e-mail dated 26 March 2003; the complainant's observations



on the Commission's opinion; the complainant's e-mail dated 11 September 2003; the complainant's comments on the Commission's reply to the first friendly solution proposal; the complainant's comments on the Commission's reply to the second friendly solution proposal; the complainant's e-mail dated 8 March 2005; complaint 1104/2005/ELB; and the complainant's observations on the Commission's opinion.

(6) In its opinion dated 14 July 2003, the Commission indicated that a minor error had been noticed, that is, that one year of relevant professional experience had been overlooked, leading to a correction of one step in the complainant's grading, that is, step 5.

(7) See, e.g., Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 80, citing Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63.

(8) Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755; Case T-126/97 *Sonasa v Commission* [1999] ECR II-2793.