

Decision of the European Ombudsman on complaint 693/2006/(BM)FOR against the European Commission

Decision

Case 693/2006/(BM)FOR - Opened on 03/05/2006 - Decision on 30/07/2008

Strasbourg, 30 July 2008

Dear Mr C.,

On 15 February 2006, you submitted a complaint to the European Ombudsman against the European Commission, which was received in my services on 6 March 2006. The complaint concerned the Commission's interpretation of Article 31 of the "General Conditions applicable to limited duration contracts for Technical Assistants in the field of EC humanitarian and food co-operation actions for third countries" (the "General Conditions") (1) .

On 3 May 2006, I informed the President of the Commission of your complaint and asked him to submit an opinion by 31 July 2006.

On 26 July 2006, the Commission requested an extension of the deadline for submitting its opinion until 30 September 2006, invoking as a reason the complexity of the case and the fact that the internal consultation procedure had proved to be more complicated than expected. By letter of 7 September 2006, I granted the requested extension and informed you accordingly.

On 23 October 2006, I informed the President of the Commission that I had not yet received the Commission's opinion and asked him to provide me, by 31 October 2006, either with a reply or with a timetable for a reply on your case. By letter of 24 October 2006, the Commission informed me that a draft reply on this case had been submitted to the responsible Commissioner for signature.

On 15 November 2006, the Commission sent its opinion in English and apologised for the delay.

By e-mail of 17 November 2006, which my services acknowledged on 22 November 2006, you informed me of your new contact details.

On 30 January 2007, the Commission sent a translation of this opinion into French and regretted that, due to circumstances beyond its control, a certain delay had occurred in transmitting this translation.



On 1 February 2007, I transferred to you the Commission's opinion in French and invited you to submit any observations by 28 February 2007. In my letter, I informed you of my further correspondence with the Commission and of the subsequent extension of the deadline, as well as of the Commission's delay in providing the translation of its opinion.

On 16 February 2007, you sent me your observations.

On 15 October 2007, you inquired as regards the status of your complaint. On 16 October 2007, my services responded to your email informing you accordingly.

On 22 November 2007, I informed you that, due to internal reorganisation, the handling of your complaint had been transferred to another legal officer.

On 31 March 2008, I sent to the Commission a proposal for a friendly solution. On 20 June 2008, the Commission sent me its reply to my proposal for a friendly solution, which I forwarded to you for your observations.

On 2 July 2008, you provided me by e-mail with your observations in relation to the Commission's reply to my proposal for a friendly solution.

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

THE COMPLAINT

According to the complainant, the relevant facts are, in summary, as follows:

On 1 April 2005, the EuropAid Office of the European Commission addressed to the complainant a proposal letter offering him a post as a technical assistant (individual expert) on a 20-month mission at the national regulator ("*Ordonnateur national*") in Senegal. The said letter was issued in the context of an external co-operation run by the Commission (2). The proposal letter included a list of the main applicable contractual provisions, as set out in the "General Conditions applicable to limited duration contracts for Technical Assistants in the field of EC humanitarian and food co-operation actions for third countries" (the "General Conditions") (3) and certain particular clauses (the "Special Conditions"). The complainant was informed in the proposal letter that he would be entitled to a "*transfer of residence allowance outside Europe*" ("*transfer of residence allowance*"), in accordance with Article 31(2) of the General Conditions. This allowance, amounting to 50% of the Reference Amount, was awarded to, amongst others, experts who were already established *outside Europe* when they started the contract, and subsequently transferred their residence (to another location outside of Europe) as a result of taking up the post. The complainant was invited to return a signed copy of the proposal letter, thereby informing the Commission of his agreement with the applicable rules.

On 4 April 2005, after receiving the proposal letter dated 1 April 2005, and before signing it, the



complainant contacted the Commission and made certain remarks, in particular, concerning the interpretation of Article 31 of the General Conditions. He argued that, since his residence was in fact in Europe at the time the Commission sent the proposal letter, Article 31(2) was thus not applicable to him.

By e-mail of 4 April 2005, the Commission explained to the complainant that it had decided to grant him a "*transfer of residence allowance*", rather than the higher "*installation allowance*", because (i) his previous contract with the Commission had recently expired; and (ii) he was already included in another Commission recruitment list.

By e-mail of 14 April 2005, the complainant informed the Commission that he accepted the conditions included in the proposal letter, but expressed certain reservations as to the application, in his case, of the "*transfer of residence allowance*". He explained that his previous contract with the European Community in the West Bank and Gaza Strip had expired on 5 January 2005. Since he still had several days of holidays under this contract, he returned to Belgium before that date, namely, on 10 December 2004. He explained that, since 4 January 2005, his legal residence had been established in a town in Belgium, where he had registered with the local authorities (*commune*).

The complainant stressed that he took part in a telephone interview with the Commission's Delegation to Senegal ("the Delegation") on 11 January 2005 and that he was informed that he had been selected for the expert position on 1 February 2005. The complainant therefore argued that he resided in Europe when he had been selected for the post.

In view of these circumstances, the complainant considered that he was entitled to receive the "*installation allowance*" set out in Article 31(1) of the General Conditions, which would amount to 150% of the Reference Amount, rather than the lower "*transfer of residence allowance*", which would amount to 50% of the Reference Amount. The complainant asked the Commission whether the revision of the contested clause would be appropriate. However, the Commission insisted that no modification of the proposed contract was necessary.

The complainant subsequently signed the contract without any modification of the applicable clauses. Article 7 of the contract (" *Dispositions particulières* "), which modified or completed the General Conditions, specified that Article 31(2) of the contract, which referred to the "*transfer of residence allowance*", was applicable. In addition, this Article contained a further provision, stating that the percentage of the Reference Amount used for the calculation of the "*transfer of residence allowance*" would be fixed in accordance with the expatriation situation of the members of the family who were dependent on the complainant.

In his complaint to the Ombudsman, the complainant questioned the validity of the application of Article 31(2) of the General Conditions in his case and attached a copy of: (i) the proposal letter of 1 April 2005; (ii) the contract; (iii) Article 31 of the General Conditions; (iv) his correspondence with the Commission; and (v) proof of his residence in Belgium.

The complainant alleged that the Commission failed to provide him with a reasonable



explanation of its position as regards which allowance he should receive and how the amount of the allowance should be calculated.

The Ombudsman asked the Commission, in particular, to clarify: (i) the reasons why the Commission considered that Article 31(2) of the General Conditions, rather than Article 31(1) of the General Conditions, should apply in the complainant's case; (ii) the purpose of the provision in Article 7 of the contract stating that the percentage of the Reference Amount used for the calculation of the " *transfer of residence allowance* " would be fixed in accordance with the expatriation situation of the members of the family who were dependent on the complainant; (iii) how the latter provision has been interpreted and applied in the complainant's case.

THE INQUIRY

The Commission's Opinion *Background information:*

In its opinion, the Commission stated that the complainant had previously been employed as a technical assistant (individual expert) for a mission in the West Bank and Gaza Strip, namely, from 6 January 2002 to 5 January 2005. He had been subsequently contacted in relation to a new contract for a mission in Senegal under the same scheme. The contract in Senegal was scheduled to begin on 5 February 2005.

The Commission also explained that, on 3 November 2004, the Commission offered the complainant a formal extension of one year, namely, until 31 December 2005, of his first contract in The West Bank and Gaza Strip. The Commission explained that, since the complainant must have learnt informally, in September 2004, that a vacant post was available in Senegal, and that he was on the initial list of suitable candidates for this post, he turned down the Commission's offer for an extension by e-mail of 8 November 2004.

The Commission stressed that the contractual clauses made a distinction between the " *transfer of residence allowance* " set out in Article 31(2) of the General Conditions and the " *installation allowance* " set out in Article 31(1). The Commission underlined the fact that the " *installation allowance* " was only granted when a person took up residence outside Europe for the first time (" *lors de la première installation hors Europe* "). The Commission also stressed that the complainant had been already paid an " *installation allowance* " in the framework of his mission to The West Bank and Gaza Strip and recalled that the complainant was currently claiming a second " *installation allowance* ", instead of the " *transfer of residence allowance* " foreseen in the new contract.

The Commission explained that, on 10 December 2004, while his contract with the Commission in The West Bank and Gaza Strip was still in force, and making use of his remaining holidays, the complainant returned to Europe. His contract in The West Bank and Gaza Strip expired on 5 January 2005. The Commission stressed that the complainant was entitled to a " *resettlement allowance* " (4) , which had been paid to him.

On 13 January 2005, after completing the evaluation of the short-listed candidates, the Delegation asked the central services in Brussels to recruit the complainant, so that he could



start in mid-February 2005. On 15 February 2005, the complainant's removal costs from the Middle East to Europe were paid by the Commission, following receipt of the bill and proof of payment. Subsequently, several e-mails had been exchanged between the complainant and the assistant at the Commission in charge of his second recruitment to the position in Senegal.

The Commission clarified that the complainant had not been able to start his new job immediately due to personal reasons (his divorce), and that the Commission had only sent to him a formal proposal on 1 April 2005, rather than in February 2005. The proposal included a provision on the "*transfer of residence allowance*". The complainant then inquired as to the reasons why he was granted this allowance, rather than an "*installation allowance*". By e-mail of 4 April 2005, the assistant, after consultation with his Head of Unit, explained to him that it would not be possible to obtain an "*installation allowance*". According to the Commission, the complainant accepted the proposal on 18 April 2005.

The employment contract was finally signed by the complainant (5). The Commission clarified that, according to Article 7 of the contract, the complainant was only entitled to the "*transfer of residence allowance*". The complainant, therefore, signed the contract with full knowledge of the Commission's position.

The Commission included, with its opinion, a copy of the complainant's e-mail of 8 November 2004, in which he rejected the Commission's offer to extend his contract in the West Bank and Gaza Strip. In this e-mail, the complainant explained that he wished to re-orientate his career and that he needed to go back to Belgium at the beginning of 2005, due to personal reasons, in particular, due to his divorce.

Reasons to apply Article 31(2), rather than Article 31(1) of the General Conditions

According to the Commission, the complainant must have known as early as September 2004, namely, three months before the end of his previous contract with it, that he was likely to be hired again and that his new contract was due to start in February 2005. The Commission argued that, since his contract in the West Bank and Gaza Strip would end on 5 January 2005, he could not reasonably expect to be granted another "*installation allowance*". In view of the very small gap between the end of the first contract and the scheduled start of the second contract, it was logical for the Commission to expect the complainant to transfer his residence from a non-European country to another, rather than settling down in his home Member State and then leaving again and settling down elsewhere outside the European Union. The Commission was of the view that the complainant's personal decision to register with local authorities and to settle down in Belgium could be said to be legitimate, but unusual, and that it seemed to have been inspired by personal reasons beyond the Commission's competence, namely, his divorce. In no way had this decision been proposed or encouraged by the Commission.

The Commission argued, on the other hand, that the contractual decision to grant the complainant only a "*transfer of residence allowance*" was also justified on the grounds of the Commission's responsibility for sound financial management, which implied minimising costs whenever this was possible.



Finally, the Commission underlined that, by e-mail of 4 April 2005, the complainant had received a reply to his question on the applicability of the "*transfer of residence allowance*" before he signed the contract. Therefore, the Commission contended that he had accepted the contract in full knowledge of the Commission's position in this respect, as recorded in Article 7 of the contract.

Purpose of the provision in Article 7 concerning the Reference Amount for the calculation of the allowance for transfer of residence

The Commission explained that the purpose of Article 7 of the contract was to record, *inter alia*, an agreement between the parties to the effect that Article 31(2) of the General Conditions was applicable. This Article specified that the percentage of the Reference Amount used for calculating the "*transfer of residence allowance*" varied, and depended on the number of family members who were actually expatriated with the employee.

The Commission argued that this Article was consistent with the equivalent rule applicable to officials of the European Communities. In particular, Article 5(4) of Annex VII of the Staff Regulations of Officials of the European Communities (the "Staff Regulations") (6) stated: "*An official who is entitled to the household allowance and does not settle with his family at the place where he is employed shall receive only half the allowance to which he would otherwise be entitled (...)*".

Concerning the complainant's particular case, since he was divorced and no dependent family members moved with him to his place of employment, the Commission considered that he was entitled to receive only 50% of the reference amount. The Commission clarified that the rationale behind this provision was that the expenses actually incurred by an employee who had moved alone would have been far smaller than if more people had been involved.

Interpretation and application of the provision in Article 7 in the complainant's case

The Commission stated that the provision in Article 7 of the contract, concerning the "*transfer of residence allowance*", left no room for interpretation, as it represented a contractual agreement that Article 31(2) of the General Conditions was applicable.

The Commission stressed that, at the moment of issuing its opinion, the relevant services of the Commission had not yet received the complainant's request for payment of this allowance. This request can be submitted after the six-month trial period at the new place of residence has been completed (7).

Conclusion

The Commission concluded that, due the complainant's previous contractual relationship with the Commission under the same scheme, and due to the short period that elapsed between the two successive contracts, it had considered his return from The West Bank and Gaza Strip to Europe as a temporary interim arrangement. This justified the application of Article 31(2) of the General Conditions, since the complainant's situation was clearly not a case of the *first installation* outside Europe.

The Commission explained that the Delegation had wished that the complainant start his new contract in mid-February 2005, namely, approximately five weeks after the previous contract. Since this period of time was roughly equivalent to the length of an annual leave, it could



certainly be regarded as a "short" period, even though no formal definition of "short period" existed.

In light of the above, the Commission maintained its initial view that the complainant should only be entitled to receive a "*transfer of residence allowance*", rather than an "*installation allowance*".

The Complainant's Observations

In his observations, the complainant provided several clarifications. He stressed first that the Commission's assumption that "*he must have learnt that a vacant post was available in Senegal*" was erroneous. The complainant explained that vacancy notices or calls for applications for the recruitment procedure of individual experts are not published in the Official Journal of the European Union or on the Commission's website. He further explained that pre-selected candidates are not informed of their success in the pre-selection procedure until they are personally contacted by the Commission.

The complainant clarified that his first contacts as regards the technical assistance mission to Dakar had taken place after he had informed the Commission, on 8 November 2004, of his intention to leave the West Bank and Gaza Strip and after his return to Belgium on 10 December 2004. In fact, on 23 December 2004, while already in Belgium, the complainant had been contacted, by telephone, by the Head of Section at the national regulator in Senegal.

The complainant explained that, initially, and after having examined the terms of reference of the contract for Senegal that were sent to Belgium by fax, he had been inclined to refuse this offer, since several points, such as the type of contract or whether it would be signed with the Commission or with the Senegalese Ministry of Finance did not appear clear to him. Subsequently, and since the Delegation had confirmed by e-mail that he would receive a contract which was identical to his previous contract in the West Bank and Gaza Strip, namely, an individual expert contract, the complainant confirmed, by e-mail of 6 January 2005, his interest in participating in the selection procedure.

The complainant stated that the telephone interview for the expert position in Senegal took place on 11 January 2005. On 1 February 2005, the Commission informed him that he had been successful. He explained that, even though, initially, the Commission, the Senegalese authorities and he himself might have preferred that the mission start earlier, he only started on 6 May 2005. This delay was due to the circulation of his file within the Commission, the late transmission of the results of his medical check-up, and the gathering of documents. In the meantime, the complainant received the project proposal in February 2005. The complainant noted that, on 22 February 2005, he verified the clause concerning the application of Article 31 of the General Conditions and made several remarks, by e-mail, to the Commission official in charge of completing his file.

The complainant was of the opinion that acceptance and signature of the contract and therefore, of its different articles, did not imply an unconditional agreement as regards those articles. He contended that, since the Commission had informed him, orally, through the official in charge of his file, that the contract proposal had to be signed in full ("*in extenso*"), its details



were not subject to negotiation after the signing. In case of disagreement, the Commission would unilaterally interpret the complainant's hesitation as evidence of his refusal and would have then contacted the next candidate on the list of pre-selected of candidates.

The complainant stated that he signed the contract on 25 April 2005. He considered that it was surprising that the Commission would expect him to transfer his residence to a non-European country for a period of four months, namely, between 5 January and 6 May 2005.

The complainant clarified that the reason he registered with the local authorities in Belgium in January 2005 was linked to the requirements concerning unemployment allowances under Belgian law. The complainant stressed that he had been unemployed and without any income since 5 January 2005 and that, in order to be entitled to an unemployment benefit and to be covered by the national medical system, he was required to have an official residence in Belgium and to be available to work in Belgium.

The complainant pointed out that, since the Delegation had been involved in his recruitment, it could provide further details on this issue.

The Ombudsman's Efforts to Achieve a Friendly Solution and Subsequent Developments

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

On the basis of a reasoned analysis of the relevant issues, which will be described in detail in Points 1.4 to 1.19 of the decision below, the Ombudsman proposed to the Commission a friendly solution, in accordance with Article 3(5) of the Ombudsman's Statute (8) . In sum, he suggested to the Commission that it could consider agreeing with the complainant that his contract be modified in order to reflect Article 31(1) of the General Conditions and that, as a consequence, he should be awarded the appropriate " *installation allowance* ".

In its reply to the Ombudsman, the Commission accepted the friendly solution proposal. It noted, in particular, that the following points made by the Ombudsman were especially relevant:

- Article 31(2) establishes a factual condition which would have been met only if the Contracting Party had been resident outside Europe at the time he took up his post in Senegal;
- The complainant has clearly established that he had taken up residence in Belgium for at least five months prior to the beginning of the contract in Senegal.
- In the event that a series of contracts were interrupted and an Individual Expert took up residence in Europe during the intervening period, it would be possible to award him/her again a 'first installation outside Europe' allowance for any subsequent contract.
- Legitimate expectations [of citizens] are particularly important when the other contracting party is in a weak negotiating position *vis-à-vis* the Commission.
- It was not possible, in the present case, to reduce costs while, at the same time, meeting the legitimate expectations of the complainant on the application of the [contract] General Conditions.
- In the event that the Commission finds that modifications should be made to the General Conditions, it may introduce such changes."



The Commission also noted that the complainant had received no legal commitment from the Commission, before signing the second contract on 25 April 2005. Therefore, the gap between his contract in the West Bank and Gaza Strip, and his contract in Senegal, was three months and twenty days (from 5 January to 25 April). Further, the gap between the trip linked with the end of the first contract and the one relating to taking up duties for the second mission was even wider and amounted to almost five months (from 10 December 2004 to 6 May 2005). Further, it was sensible for the complainant to settle in his place of origin while waiting for the second contract. In sum, all he had before signing that second contract was simply informal knowledge of the Commission's plans. No commitment had been made by either party. The Commission also took note of the fact that he had relocated his belongings to Europe, rather than from the Middle East to Senegal.

The Commission, in this context, found the European Ombudsman's proposal to be reasonable.

The Commission stated that it would instruct the relevant services to transfer to the complainant the difference between the transfer of residence allowance which had already been paid (Euros 869) and the installation allowance. This decision involves a supplementary payment of Euros 1 738.

In his observations on the Commission's reply, the complainant indicated that he was satisfied with the reply of the Commission. He noted that the Commission had already transferred to him the outstanding amount. The complainant thanked the Ombudsman for his work.

THE DECISION

1 Commission's failure to provide a reasonable explanation for its position

1.1 On 1 April 2005, the complainant received a proposal letter from the European Commission to work for it on a 20-month mission at the national regulator ("*Ordonnateur national*") of Senegal. The proposal letter included a list of the main provisions of his future contract. According to the proposal, the complainant would be entitled to a "*transfer of residence allowance outside Europe*" ("*transfer of residence allowance*"), as set out in Article 31(2) of the "General Conditions applicable to limited duration contracts for Technical Assistants in the field of EC humanitarian and food co-operation actions for third countries" (the "General Conditions") (9). This allowance, which amounted to 50% of the Reference Amount, was awarded to experts who were already established in a country outside Europe at the moment they started a contract, and who had to transfer their residence to another country in order to take up the new post.

The complainant was invited to return a signed copy of the proposal, thereby informing the Commission of his acceptance of the applicable rules. A contract of fixed duration was to be subsequently concluded.

After receiving the draft contract dated 1 April 2005, and before signing it, the complainant contacted the Commission on 4 April 2005 and made certain remarks concerning, in particular,



the interpretation of Article 31 of the General Conditions. He pointed out that, since, at the time the Commission made the proposal, his residence was in fact in Europe, Article 31(2) was not applicable to his case (10) .

By e-mail of 4 April 2005, the Commission explained to the complainant that it had decided to grant him a " *transfer of residence allowance* ", rather than the higher " *installation allowance* ", because (i) his previous contract with the Commission had recently expired, and (ii) he was already included in another Commission recruitment list.

The complainant explained that, since 4 January 2005, his legal residence had been established in a town in Belgium, where he had registered with the local authorities (*commune*). The complainant stressed that he held a telephone interview with the Commission's Delegation to Senegal ("the Delegation") on 11 January 2005 and that, on 1 February 2005, he was informed that he had been selected for the position of individual expert. The complainant clarified that both on the date he was selected for the position of individual expert (1 February 2005), and on the date of his departure for this post (6 May 2005), his legal residence was in Belgium and that it had been so since 4 January 2005.

By e-mail of 14 April 2005, the complainant informed the Commission that he accepted the conditions included in the proposal letter, but expressed certain reservations as regards his entitlement to the " *transfer of residence allowance* " included therein.

On 15 February 2006 the complainant submitted a complaint to the European Ombudsman against the Commission, concerning the latter's interpretation of Article 31 of the "General Conditions" (11) .

The complainant alleged that the Commission failed to provide him with a reasonable explanation of its position concerning which allowance he should receive and how the amount of the allowance should be calculated.

1.2 In its opinion, the Commission stated that the complainant had previously, namely, from 6 January 2002 to 5 January 2005, been employed as a technical assistant (individual expert) for a mission in The West Bank and Gaza Strip. He was subsequently contacted for a new contract, under the same scheme for technical assistants, for a mission in Senegal, scheduled to begin on 5 February 2005.

The Commission explained that, on 3 November 2004, it had offered the complainant a formal extension of one year of his first contract in The West Bank and Gaza Strip, that is, until 31 December 2005. The Commission explained that, since the complainant must have learnt informally, in September 2004, that a vacant post was available in Senegal and that he was on the initial list of suitable candidates for this post, he had turned down the Commission's offer for the above one-year extension by e-mail of 8 November 2004.

The Commission explained that the Delegation had hoped that the complainant could start work on his contract in mid-February 2005, namely, some five weeks after the previous contract was



to expire. Since this period of time was approximately equivalent to the length of his annual leave, it could certainly be regarded as a "short period", even though no formal definition of "short period" existed.

The Commission was of the view that the complainant's personal decision to register with the local authorities and to settle down in Belgium could be said to be legitimate, but unusual, and that it seemed to have been inspired by personal reasons beyond the Commission's competence, namely, his divorce.

The Commission also stated that the Reference Amount used for calculating the "*transfer of residence allowance*" varied, and depended on the number of family members who were actually expatriated with the employee. Concerning the complainant's particular case, since he was divorced and no dependent family members moved with him to his place of employment, the Commission considered that he was entitled to receive only 50% of the reference amount. The Commission clarified that the rationale behind this provision was that the expenses actually incurred by an employee who had moved alone would have been far smaller than if more people had been involved. This mirrored the provision applicable to officials found in Article 5(4) of Annex VII of the Staff Regulations.

The Commission argued that the contractual decision to grant the complainant only a "*transfer of residence allowance*" was also justified on the grounds of its responsibility concerning sound financial management, which implied minimising costs whenever this was possible.

Finally, the Commission underlined that the complainant had received a reply to his question on the applicability of the "*transfer of residence allowance*" before he signed the present contract, which he did by e-mail on 4 April 2005. Therefore, the Commission contended that he had accepted the contract in full knowledge of the Commission's position in this respect, as recorded in Article 7 of the contract.

In light of the above, the Commission maintained its initial view that the complainant should only be entitled to receive a "*transfer of residence allowance*", rather than an "*installation allowance*".

1.3 In his observations, the complainant stressed that the Commission's assumption that "*he must have learnt that a vacant post was available in Senegal*" was erroneous. In this regard, he explained that pre-selected candidates are not informed of their success in the pre-selection process until they are personally contacted by the Commission.

The complainant stated that he signed the new contract on 25 April 2005.

The complainant stressed that he had been unemployed and without any income since 5 January 2005 and that, in order to be entitled to an unemployment allowance and to be covered by the national medical system, he was required to have an official residence in Belgium and to be available to work in Belgium.



1.4 In his proposal for a friendly solution, the Ombudsman stated that the Commission had concluded that, in light of the complainant's previous contractual relationship with the Commission in The West Bank and Gaza Strip, and in light of what it considered to be a short period of time separating the two contracts, it considered his return from The West Bank and Gaza Strip to Europe to be a " *temporary interim arrangement* ". It thus considered that Article 31(2) of the General Conditions was applicable in relation to his appointment in Senegal.

1.5 The Ombudsman noted key excerpts of the General Conditions, namely, Article 31, which reads as follows: (12)

" Article 31 - Allowances linked to installation and reinstallation

Depending on the location of his permanent posting outside Europe, the Contracting Party receives one or the other of the following installation allowances:

31.1 Installation allowance

When he takes up his duties outside Europe at the beginning of his contract , the Contracting Party, who, because of his posting, has had to move his residence from Europe to a country outside Europe, receives a first installation outside Europe allowance equal to 150% of the Reference Amount. (...)

31.2 Transfer of residence outside Europe

A transfer of residence allowance can be granted to the Contracting Party, already established outside Europe upon commencing the duties, when he is required, because of his posting, to transfer his residence. (...)

(Emphasis added by the Ombudsman).

1.6 The Ombudsman recalled that the allegation made by the complainant was not that the Commission infringed a contract signed with him, but rather, that the Commission should have applied, in the case of his contract with the Commission, Article 31(1) of the General Conditions, rather than Article 31(2) thereof.

1.7 The Ombudsman noted that principles of good administration require that Community institutions and bodies respect the legitimate expectations of third parties. The Ombudsman considered that, by making the General Conditions available to interested parties, including the complainant, the Commission creates a legitimate expectation that the General Conditions will be applied correctly. A finding that the General Conditions have not been so applied may lead the Ombudsman to conclude that there has been an instance of maladministration.

1.8 The Ombudsman noted that the opening sentence of Article 31 of the General Conditions establishes that a Contracting Party, whose permanent posting is outside Europe, is entitled to receive " *one or the other of the following installation allowances* ", that is, either the "



installation allowance " set out in Article 31(1) or the " *transfer of residence allowance* " set out in Article 31(2). In sum, the General Conditions do not allow for a situation where neither allowance will apply.

Article 31(2) of the General Conditions

1.9 The Ombudsman noted that, in order to receive the " *transfer of residence allowance* " described in Article 31(2) of the General Conditions, the Contracting Party must be already established outside of Europe at the time of taking up his post under the contract. Article 31(2), therefore, establishes a factual test, which will only be met if the Contracting Party were resident outside Europe at the time he took up his post under the contract in Senegal.

The complainant formally took up residence in Belgium on 4 January 2005. The Delegation conducted the telephone interview with the complainant on 11 January 2005. The complainant was informed that he had been selected for the expert position on 1 February 2005. The complainant received the proposal letter from the Commission on 1 April 2005, and thereafter signed the contract. He took up his post in Senegal on 6 May 2005.

The Ombudsman noted that, during all the key stages of negotiation and conclusion of the contract for the post in Senegal, the complainant resided in Europe. The Ombudsman, therefore, concluded that, since the complainant's residence was clearly in Europe at the time he took up his post in Senegal, the " *transfer of residence allowance* ", set out in Article 31(2) of the General Conditions, could not apply to his case. It could only have applied had the Commission taken steps to sign a new contract with the complainant while he was still resident outside Europe.

1.10 The Ombudsman noted that, while the Commission may have assumed that the complainant would transfer his residence directly from one non-European country to another, the application of Article 31(2) of the General Conditions is based on a factual assessment of the Contracting Party's residence at the time he takes up his post. The Ombudsman was thus of the opinion that the complainant had, on the basis of verifiable facts, clearly established that he had taken up residence in Belgium for at least five months prior to the beginning of the contract in Senegal, namely, from 4 January 2005 to 6 May 2005.

Therefore, the Ombudsman came to the provisional conclusion that the Commission's assumption regarding the complainant's residence, and its consequent decision that Article 31(2) of the General Conditions was applicable to the complainant, were not correct.

Article 31(1) of the General Conditions

1.11 As regards the application of Article 31(1) of the General Conditions, the Ombudsman noted that the expression " *first installation outside Europe allowance* " mentioned in Article 31(1) raised certain difficulties concerning interpretation, especially in light of the reference to a " *first* " installation.

In its submissions, the Commission contended that the complainant had been already paid an " *installation allowance* " in connection with his mission to The West Bank and Gaza Strip. From this statement the Ombudsman deduces that the Commission's interpretation of the term " *first installation* " is that this allowance can be claimed only once in the career of a technical



assistant.

1.12 In light of the above, the Ombudsman was not convinced by what he understood to be the Commission's interpretation. The Ombudsman recalled that, as stated in point 1.8 above, the opening sentence of Article 31 of the General Conditions establishes that a Contracting Party is entitled to receive "*one or the other of the following installation allowances*", that is, either the "*installation allowance*" set out in Article 31(1) or the "*transfer of residence allowance*" set out in Article 31(2). However, if correct, the Commission's interpretation of Article 31 would lead to a paradoxical scenario, whereby (i) the "*installation allowance*" set out in Article 31(1) could not apply where an individual expert had previously received an "*installation allowance*" pursuant to Article 31(1) and, for a period of time, ceased to work for the Commission's delegations and took up residence in Europe; and (ii) the "*transfer of residence allowance*" set out in Article 31(2) could not apply since the individual expert's residence would be in Europe when he took up his duties. Such an individual expert would, in sum, be entitled to neither the "*installation allowance*" set out in Article 31(1), nor the "*transfer of residence allowance*" set out in Article 31(2). This interpretation would clearly contravene the opening sentence of Article 31, which provides that "*[d]epending on the location of his permanent posting outside Europe, the Contracting Party receives one or the other of the following installation allowances (...)*". In light of the above, the Ombudsman could not accept the interpretation of the Commission.

1.13 An alternative interpretation of Article 31(1) of the General Conditions, which would be consistent with the meaning of the first sentence of Article 31, and with the meaning of Article 31 as a whole, would imply that where an individual expert entered into a series of consecutive contracts outside Europe, the individual expert would only receive the "*first installation outside Europe allowance*" in relation to the first of that series of consecutive contracts. However, in the event the series of contracts were interrupted, and the individual expert took up residence in Europe during the intervening period, it would be again possible to award a "*first installation outside Europe allowance*" for any subsequent contract with the expert.

The interpretation suggested by the Ombudsman did not, the Ombudsman pointed out, appear to contradict the apparent purpose of Article 31(1), which is to compensate individual experts for costs incurred by them in relocating from Europe to take up a post located outside Europe. In sum, the Ombudsman did not consider it obvious that an individual expert who has re-established his residence in Europe, after having completed a contract, or a series of contracts outside of Europe, would incur fewer costs as regards his establishment outside Europe than would an individual expert who was offered a contract outside of Europe for the first time in his career.

1.14 The Ombudsman noted that the Commission also maintained that, by e-mail of 4 April 2005, the complainant received a reply to his question concerning the applicability of the "*transfer of residence allowance*" before he signed the contract. Therefore, the Commission contended that he had accepted the contract in full knowledge of the Commission's position, as recorded in Article 7 of the contract.

1.15 The Ombudsman first of all stressed that the complainant had made known to the



Commission his reservations about the contractual provision for a "*transfer of residence allowance*". The complainant also stated that, since the Commission had informed him, orally, through the official in charge of his file, that the contract proposal had to be signed in full, its details were not negotiable. Further, the complainant also stated that, in the event of any disagreement, the Commission would interpret the complainant's hesitation as evidence of his refusal to agree to the contract.

1.16 The Ombudsman agreed that the Commission has a wide margin of discretion as regards the provisions it includes in contracts and as regards how it negotiates contracts. Further, the Ombudsman agreed that the Commission can normally endeavour to improve its contractual position through negotiation. However, the Commission's margin of discretion as regards the negotiation of contracts can be limited when it sets out, in publicly available documents, such as the "General Conditions applicable to limited duration contracts for Technical Assistants in the field of EC humanitarian and food co-operation actions for third countries", the general conditions which will apply to a particular category of contracts. In such circumstances, a legitimate expectation is created that the Commission will negotiate *within the limits* of these general conditions.

1.17 Principles of good administration require the Commission to respect the legitimate expectations of citizens. Such legitimate expectations are particularly important when the other contracting party is in a relatively weak negotiating position vis-à-vis the Commission, which appears to be the case as regards individual experts.

1.18 The Ombudsman then reached the provisional conclusion that the Commission misinterpreted the specific facts concerning the complainant. In sum, it erroneously assumed that he would not take up residence in Europe after the expiry of his contract in The West Bank and Gaza Strip. The Ombudsman went on to point out that, as a consequence, the Commission wrongly applied Article 31 of the General Conditions by granting the complainant the "*transfer of residence allowance*" set out in Article 31(2), rather than the more appropriate "*installation allowance*" set out in Article 31(1). As such, the Ombudsman reached the provisional conclusion that the Commission infringed the complainant's legitimate expectations. In this context, the Ombudsman made a proposal for a friendly solution, namely, that the Commission could consider agreeing with the complainant that his contract be modified in order to reflect Article 31(1) of the General Conditions and that, as a consequence, he should be awarded the appropriate "*installation allowance*".

The Ombudsman also noted that the Commission argued further that the contractual decision to grant the complainant a "*transfer of residence allowance*" was also justified on the grounds of the Commission's responsibility for sound financial management, which implied minimising costs "*whenever this was possible*". The Ombudsman noted, in this respect, that, while it is clearly necessary for the Commission to reduce costs where possible, it was not, in the present case, possible to reduce costs whilst, at the same time, meeting the legitimate expectations of the complainant in relation to the application of the General Conditions to the complainant.

The Ombudsman finally noted that the Commission has a broad margin of discretion as regards



which provisions it includes in the General Conditions. In the event the Commission considered that modifications should be made to General Conditions, the Commission could introduce such changes. However, in view of the principle of legitimate expectations, any such modification should only affect contracts signed subsequent to the introduction of such changes.

1.19 In its reply to the Ombudsman, the Commission accepted the friendly solution proposal of the Ombudsman. It noted, in particular, that the following points made by the Ombudsman were especially relevant.

- Article 31(2) establishes a factual condition which would have been met only if the Contracting Party had been resident outside Europe at the time he took up his post in Senegal;
- The complainant has clearly established that he had taken up residence in Belgium for at least five months prior to the beginning of the contract in Senegal.
- In the event that a series of contracts were interrupted and an Individual Expert took up residence in Europe during the intervening period, it would be possible to award him/her again a 'first installation outside Europe' allowance for any subsequent contract.
- Legitimate expectations [of citizens] are particularly important when the other contracting party is in a weak negotiating position vis-à-vis the Commission.
- It was not possible, in the present case, to reduce costs while, at the same time, meeting the legitimate expectations of the complainant on the application of the [contract] General Conditions.
- In the event that the Commission finds that modifications should be made to the General Conditions, it may introduce such changes."

1.20 The Commission also noted that the complainant had received no commitment from the Commission that he would be appointed to the post in Senegal, before signing the second contract on 25 April 2005. Therefore, the gap between his contract in the West Bank and Gaza Strip and his contract in Senegal, was three months and twenty days (from 5 January to 25 April). Further, the gap between the trips linked with the end of the first contract and the one relating to taking up duties for the second mission was even wider and amounted to almost five months (from 10 December 2004 to 6 May 2005). It was, in addition, sensible for the complainant to settle in his place of origin while waiting for the second contract. In sum, all he had before signing that second contract was simply informal knowledge of the Commission's plans. The Commission also took note of the fact that he had relocated his belongings from the Middle East to Europe, rather than from the Middle East to Senegal.

1.21 In this context, the Commission found the European Ombudsman's proposal to be reasonable. The Commission stated that it would instruct the relevant services to transfer to the complainant the difference between the transfer of residence allowance, which had already been paid (Euros 869), and the installation allowance. That decision involved a supplementary payment of Euros 1 738 to the complainant.

1.22 In his observations on the Commission's reply, the complainant indicated that he was satisfied with the Commission's response. He noted that the Commission had already transferred to him the outstanding amount. The complainant thanked the Ombudsman for his work.



2 The purpose of Article 7 of the contract, relating to the calculation of the percentage of the Reference Amount and its application to the complainant's case

2.1 While the complainant's main allegation concerned the interpretation of Article 31(1) and Article 31(2) of the General Conditions, he also asked for clarification on the "purpose" of Article 7 of the contract. Article 7 of the contract states that the percentage of the Reference Amount used for calculating the " *transfer of residence allowance* " would be fixed in accordance with the expatriation situation of the members of the family who were dependent on the complainant.

He also asked how Article 7 of the contract has been interpreted and applied in his case.

2.2 In its opinion, the Commission explained that the percentage of the Reference Amount due depended upon the number of family members who were actually expatriated with the employee. Concerning the complainant's particular case, since he was divorced and no dependent family members moved with him to his place of employment, the Commission considered that he was entitled to receive only 50% of the Reference Amount.

The Commission stated that this provision is equivalent to the provision applicable to officials, found in Article 5(4) of Annex VII of the Staff Regulations.

2.3 The specific factual circumstances of the complainant lead the Ombudsman to presume that this issue is not of practical relevance in the present case. It is, in fact, not contested that, at the time he took up the post in Senegal, the complainant was single and without dependent children. Therefore, in the complainant's case, there is no variation of the percentage of the Reference Amount based on his family situation. Therefore, no further inquiries into this issue are justified.

3 Conclusion

Following the Ombudsman's inquiry, it appears that a friendly solution to the complaint has been achieved. The Ombudsman therefore closes the case.

The European Commission will also be informed of this Decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) In the original French: " *Dispositions générales applicables aux Contrats de travail à durée déterminée des Assistants techniques pour les actions de coopération au bénéfice des pays tiers et dans le cadre de l'aide humanitaire ou alimentaire de la Commission européenne.* "

(2) The post was offered within the framework of the " *Programmation et la gestion de marchés au Senegal* ".

(3) In the original French: " *Dispositions générales applicables aux Contrats de travail à durée* "



déterminée des Assistants techniques pour les actions de coopération au bénéfice des pays tiers et dans le cadre de l'aide humanitaire au alimentaire de la Commission européenne. "

(4) The *resettlement allowance* is set up in Article 31(3) of the General Conditions for contractors who, at the end of their contract, leave the Commission's service and the country outside Europe to which they are assigned, provided the contracting party has at least two years of service with the Commission (including holidays). This allowance amounts to 50% of the Reference Amount and is paid at the date of the end of the contract.

(5) The Commission did not specify on which date the contract was signed by the complainant.

(6) This Article refers to the *installation allowance* .

(7) Article 31(2) of the General Conditions sets out, in paragraph 4, as regards the allowance for transfer of residence, that (in the original French): "*Toutefois, elle n'est définitivement acquise au Contractant qu'après accomplissement d'un minimum de six mois complets de service dans le nouveau pays d'emploi (sauf si le Contractant n'a pas été en mesure d'accomplir cette période de service complète pour des raisons imputables à la Commission).*"

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

(9) See footnote 2 above.

(10) The Ombudsman understands that the "transfer of residence allowance" set out in Article 31(2) of the General Conditions is lower than an "installation allowance" set out in Article 31(2) of the General Conditions.

(11) See footnote 2 above.

(12) Translation from the original French by the Ombudsman's services. The original text states:

" Article 31 - INDEMNITES LIEES A L'INSTALLATION ET A LA REINSTALLATION

Selon la localisation de son affectation permanente hors Europe, le Contractant perçoit l'une ou l'autre des indemnités d'installation suivantes:

31.1 Indemnité d'installation

Lors de sa prise de fonctions hors Europe au début de son Contrat, le Contractant tenu, du fait de son affectation, de transférer sa résidence d'Europe vers un pays situé hors Europe perçoit une indemnité de premier installation hors Europe égale à 150% du Montant de Référence. (...)

31.2 Transfert de résidence hors Europe



Une indemnité de transfert de résidence peut être octroyée au Contractant, déjà établi hors Europe lors de sa prise de fonctions mais tenu, du fait de son affectation, de transférer sa résidence. (...) ".