

Decision of the European Ombudsman closing his inquiry into complaint 258/2008/VIK against the European Commission

Decision

Case 258/2008/VIK - Opened on 25/02/2008 - Decision on 09/12/2008

THE BACKGROUND TO THE COMPLAINT

1. The present complaint was submitted by a national of Member State X, who is employed as a temporary agent by the Council.
2. The complainant took part in competition COM/TA/07/04, organised by the Commission for temporary agents in the field of translation for Latvian, Maltese and Slovene languages. On 22 October 2007, the Commission informed the complainant that he was among the successful candidates and that his name had been put on the reserve list. It went on to point out that inclusion in the reserve list did not, however, guarantee that he would be recruited.
3. On 15 November 2007, the Commission's Directorate-General for Translation (DGT), submitted a request for the complainant's recruitment to the Commission's Directorate-General for Administration and Personnel (DG ADMIN).
4. On 20 November 2007, DGT informed the complainant that his file had been blocked by DG ADMIN for reasons unknown to it. The complainant was also informed that it is DG ADMIN that "*formally issue[s] and sign[s] job offers and contracts*".
5. From the last week of November 2007 until early January 2008, the complainant contacted DG ADMIN on several occasions, requesting information concerning the progress of his recruitment and the possible problems related to it.
6. Given that the complainant was unable to obtain the above-mentioned information, on 22 January 2008 he filed the present complaint with the Ombudsman.

THE SUBJECT-MATTER OF THE INQUIRY



7. The Ombudsman identified the following allegations and claim:

- The complainant alleges that the decision related to his recruitment is being delayed by the Commission, since no real progress appears to have been made since October 2007.
- The complainant alleges that the Commission failed to inform him properly of the progress of his recruitment and of any possible problems related to it.

The complainant claims that his recruitment should be quickly finalised by the Commission.

8. It is important to note that, in his complaint to the Ombudsman, the complainant included an e-mail which he sent to the Commission on 5 December 2007. In this e-mail, he pointed out that the Council had informed him that it had *not* accepted the Commission's request for his recruitment. The complainant disagreed with the Council's decision and argued in the said e-mail that the Council had infringed his fundamental right to avail himself of better job opportunities and to change employment. He also expressed his willingness to resign from his current post at the Council, if this was the only way he would be able to take up employment with the Commission.

9. In his complaint to the Ombudsman, however, the complainant clearly indicated that he only wished to complain against the Commission. In any event, a complaint against the Council would have been inadmissible, as the complainant had not provided any evidence to show that he had made appropriate prior approaches to that institution.

10. In his observations, the complainant added a new claim, which was directed at the Council. In his view, given that the Council had responded negatively to his recruitment by the Commission, it would now be fair for the Council to "match" the conditions that were offered by the Commission to candidates recruited following the above-mentioned selection procedure. The complainant claimed, in essence, that the Council should provide him with a four-year contract, with the possibility of renewal for an additional two years. It thus appears that, by adding this new aspect, the complainant wished to complain against the Council as well. However, he did not provide any evidence to show that he had exhausted the internal administrative means of redress with the Council. The Ombudsman therefore takes the view that this new claim is inadmissible on the basis of Article 2(8) of his Statute [1]. The complainant is free to lodge a new complaint against the Council, provided that he submits evidence to show that he has made use of the appeal procedures referred to in Article 90(1) and (2) of the Staff Regulations.

THE INQUIRY

11. The Ombudsman opened an inquiry into the above-mentioned allegations and claim, and asked the Commission to submit an opinion on them by 31 May 2008. In its opinion, the Commission pointed out that it had in the meantime informed the complainant of its decision not to recruit him. An official reply, setting out the reasons for the Commission's decision was sent to the complainant on 12 March 2008.



12. The Commission's opinion was forwarded to the complainant with an invitation to make observations, which he sent on 1 July 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. As regards the complainant's allegations

Arguments presented to the Ombudsman

13. The complainant alleged that the Commission unnecessarily delayed his recruitment and failed to inform him properly about the progress of his recruitment.

14. In its opinion, the Commission recognised that it did not provide the complainant with a substantive reply concerning his recruitment until 12 March 2008 and apologised to him in this regard.

The Ombudsman's assessment

15. From the evidence provided, it appears that a request for the complainant's recruitment was submitted by DGT to DG ADMIN on 15 November 2007. The negative decision of DG ADMIN was communicated to the complainant nearly four months later, namely, on 12 March 2008. Nevertheless, the Commission acknowledged the delay and offered an apology to the complainant. The Ombudsman therefore takes the view that there are no grounds for further inquiries concerning this part of the complaint.

B. As regards the complainant's claim

Arguments presented to the Ombudsman

16. The complainant claimed that he should be recruited by the Commission as soon as possible.

17. The Commission explained that it had decided not to recruit the complainant for the following reasons.

18. When DG ADMIN found out that the complainant was already employed as a temporary agent by another European institution (the Council), it contacted the Council to inquire whether the termination of the complainant's contract with the latter would cause any problems. The Council replied that the continuation of the complainant's employment was of crucial importance for its operations. In view of this reply, the Commission, in agreement with the Council, decided that the joint interest of the service of both European institutions required for the complainant not to be recruited by the Commission. Consequently, the Commission refrained from making



an offer to the complainant, explaining that his recruitment with it would have hampered the short and medium term continuity of the service in the Council. It would therefore have been contrary to the principles of good inter-institutional collaboration.

19. The Commission stressed that no offer of employment was ever addressed to the complainant. It further pointed out that it enjoys a wide margin of discretion in recruitment procedures and that candidates who are successful in competitions do not have the right, but merely the possibility to be recruited. This implies that the Commission is not bound to recruit all the persons from the relevant reserve list. This was clearly explained to the complainant in the Commission's letter of 22 October 2007. The Commission concluded that the complainant was not entitled to insist on being recruited by it. Given that the Commission had no obligation whatsoever to recruit him, it considered that it had not infringed the complainant's fundamental rights to avail himself of better job opportunities and to change employment.

20. The Commission further pointed out that it did not question the complainant's right to take up employment with any other institution, agency or even with the Commission at a later stage, when the negative impact of his potential departure on the Council's operations ceases to exist. The complainant could thus still be employed by the Commission, as long as the relevant reserve list remains valid and provided that the assessment regarding the interest of the service changes.

21. The Commission finally drew the Ombudsman's attention to the fact that the authority responsible for concluding contracts was bound by the Staff Regulations and the Conditions of employment of other servants of the European Communities, according to which it should act solely in the interest of the service.

22. In his observations, the complainant pointed out that he had informed the Commission during his interview, that is to say, the oral test of the competition which took place on 25 September 2007, that he was working for the Council. The Commission, however, did not cancel his application at that point, but instead put him on the reserve list. It then took concrete steps with a view to recruiting him, although it was aware at the time that he was employed by the Council.

23. The complainant submitted that, following DGT's request to recruit him, it was a matter of "*administrative routine*" for him to be sent an employment offer. He argued that the Commission should not have blocked the recruitment process. The Commission's statements concerning its obligations towards candidates on the reserve lists were irrelevant in this particular case, since a number of steps had already been taken by the Commission to recruit him.

24. The complainant argued that the Commission acted arbitrarily and discriminated against him on the grounds of his current employment, thus putting him in a disadvantageous position in comparison with other fellow nationals placed on the same reserve list. These other nationals were recruited by the Commission on contracts with better conditions than his contract with the Council. The complainant was, however, prevented from using this opportunity and his right of fair access to employment was thus infringed by the Commission.



25. Following from the above consideration, the complainant maintained his claim that the Commission should finalise the recruitment that it had already started without discriminating against him on the grounds of employment.

The Ombudsman's assessment

26. The complainant pointed out that the Commission knew that he was working for the Council when drawing up the relevant reserve list, but nevertheless included his name on it. The Ombudsman considers that a distinction should be made between the selection process and the recruitment process. By including the name of the complainant on the reserve list, the Commission finalised the selection process of suitable candidates. Given that the complainant had successfully passed the competition, the Commission was obliged to include his name in the reserve list. The subject matter of the present complaint concerns however the recruitment of candidates, which is a follow-up process, different from the selection process.

27. The Ombudsman recalls in this regard that, in light of the case-law of the Community Courts, the decision to include a successful candidate on a reserve list does not impose any right to be recruited, but merely the possibility to be recruited to a post ("*uniquement une vocation à être nommé*") [2]. It is thus clear that candidates do not enjoy any legal right to be recruited, even if they are placed on a reserve list. In the present case, the Commission duly clarified this to the complainant.

28. The Ombudsman notes that DGT submitted a request to DG ADMIN for the complainant's recruitment. It appears from the evidence provided that DG ADMIN was the authority responsible for concluding contracts. It was thus DG ADMIN's responsibility to address an employment offer to the complainant, which would have given him the right to be recruited. However, no such employment offer was made in the present case. The Ombudsman considers it obvious that the fact that a request for the complainant's recruitment had been made internally did not entitle him to demand his recruitment. In accordance with Article 30 of the Staff Regulations, the Appointing Authority shall decide whether or not to make an employment offer [3].

29. The Ombudsman notes that Article 7 of the Staff Regulations provides that the Appointing Authority shall act "*solely in the interest of the service*". The Commission argued that this implied that it also needed to have due regard to the interests of the Council. It therefore had to refrain from recruiting the complainant, since doing so would have endangered the short and medium term continuity of the service in the Council. The Ombudsman considers that the Commission's approach was in conformity with the Staff Regulations. It should be noted that the complainant has not argued or shown that the Council's argument that his continued employment was of crucial importance for the latter's operations was manifestly incorrect. The Commission also pointed out that the complainant could still be recruited by it at a later stage, provided that the assessment of the interest of the service changes over time.

30. The complainant argued that, following the request for his recruitment by DGT, it was only a



matter of " *administrative routine* " to be recruited by the Commission, since the procedure for his recruitment had already started. He thus seemed to argue that, by not recruiting him, the Commission violated the principle of legitimate expectations.

31. It follows from the case-law of the Community courts that the principle of legitimate expectations can only be invoked if the administration has given " *precise, unconditional and consistent* " assurances to the person concerned. Such assurances, in whatever form they are given, should also come " *from authorised and reliable sources* " [4] . This was clearly not the case in the complainant's situation. Even though he was informed that DGT wished to recruit him, he was not given any assurance that this would happen. Furthermore, he was informed from the very beginning that DGT's proposal to recruit him had met with problems and had been " *blocked at the DG ADMIN level* " (the Commission's e-mail to the complainant of 20 November 2008). The Ombudsman thus considers that the complainant could not expect that his recruitment would be a matter of " *administrative routine* ".

32. Concerning the alleged discrimination *vis-à-vis* other fellow nationals that had successfully passed the same selection procedure, the Ombudsman considers that the complainant was not in the same situation as they because he was already working for one of the Community institutions, namely, the Council. Therefore, there was no breach of the principle of non-discrimination in the present case, since the complainant was not in the same position as other candidates.

33. In view of the above considerations, the complainant's claim that the Commission should finalise his recruitment must fail.

C. Conclusions

The Ombudsman takes the view that further inquiries into the complainant's allegations would not be justified. As regards the complainant's claim, the Ombudsman finds no maladministration by the Commission. He thus closes the case.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 9 December 2008

[1] Article 2(8) of the Statute of the European Ombudsman reads as follows:

" *No complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all the possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90(1) and (2) of the Staff Regulations, have been exhausted by the person concerned and the time limits for replies by the authority thus petitioned have*



expired. "

[2] See Case T-306/04 *Luxem v Commission* [2005] ECR-SC I-A-263 and II-1209, paragraph 22.

[3] Article 30 of the Staff Regulations reads as follows: "*The appointing authority shall decide which of these candidates to appoint to the vacant post.* "

[4] See Case T- 273/01 *Innova Privat-Akademie v Commission* [2003] ECR II-1093, paragraph 26.