

Decision of the European Ombudsman closing his inquiry into complaint 402/2008/(BEH)WP against the European Commission

Decision

Case 402/2008/(BEH)(WP)BEH - Opened on 20/02/2008 - Decision on 16/12/2008

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a German national of Turkish origin. She complained to the European Ombudsman regarding the European Commission's investigation of an infringement complaint she submitted to it. In her complaint, she alleged that her employer, a German University ('the University'), had discriminated against her due to both her origin and sex.

2. The facts of the case are, in summary, as follows:

From 1967 onwards, the complainant worked at the University on the basis of numerous fixed-term assignments. From 1987 to 1989, she was employed on the basis of a full-time fixed-term contract. On 1 April 1990, she was employed as a Turkish lecturer on a 50% part-time basis (she shared her employment with another female colleague). A health certificate was missing from the complainant's file at this time. As a result, the contract, under which she had to teach six hours per week, was concluded for a fixed term expiring on 30 June 1990. After producing the missing health certificate, the complainant was employed, from 1 July 1990 onwards, on the basis of a 50% part-time permanent contract. Unlike the previous fixed-term contract, this contract provided for her to teach eight hours per week, but under the same conditions. Her female colleague, however, continued to work only six hours per week, due to the principle of vested rights. In addition to the permanent contract, the complainant, at that time, also worked four hours per week as a Turkish language trainer on the basis of fixed-term teaching assignments.

3. Once the complainant had signed the permanent contract starting on 1 July 1990, she asked her employer to reduce her weekly teaching obligations from eight to six hours. The University rejected this request. Subsequently, the University also refused to merge the two occupations into one permanent full-time job. In 1993, the position of the complainant's aforementioned colleague became vacant. However, when the complainant applied for the said position, she was rejected.



4. In 1994, the complainant initiated court proceedings in Germany against her employer, seeking to secure a single permanent employment contract for 12 hours per week. She argued that splitting her employment into teaching assignments and a part-time employment contract constituted abusive behaviour on the part of her employer. Her action was dismissed by the Local Labour Court, the Higher Labour Court and the Federal Labour Court. In its judgment of 23 May 2001, the Federal Labour Court stated that there was no evidence of abusive behaviour on the part of the complainant's employer, who was entitled by law to employ people on the basis of teaching assignments. In addition to that, the Court ruled that no indirect sexual discrimination against the complainant could be established. It also held that the complainant did not submit any evidence to support her argument that her employer offered full-time contracts to men, but only part-time contracts to women, which involved (less lucrative) teaching assignments. The complainant subsequently turned to the German Constitutional Court and to the European Court of Human Rights ('ECtHR'). These applications were rejected on 7 March 2002 and 24 February 2005 respectively. The complainant retired in 2002.

5. By letter of 27 December 2004, the complainant turned to the European Commission. In this letter, as well as in her further correspondence to the Institution, she complained about: (i) the separation of her employment into a part-time contract and teaching assignments; and (ii) the increase in her teaching obligations from six to eight hours per week. According to her, she had been racially and sexually discriminated against by her employer, in breach of Directive 2000/43/EC and Article 141 of the EC Treaty. She submitted that the court proceedings against her employer before the German courts had been unfair and that the judges involved had perverted the course of justice and influenced her lawyers. As a result, she had not been not assisted properly in the court proceedings. She further complained that EU citizens of non-European origin were being discriminated against in EU Member States and that Germany would not guarantee the legal security of citizens of non-German origin. The complainant added that the proceedings before the ECtHR had also been unfair and asked the Commission to take steps against the German law courts and help her obtain an adequate salary and pension in relation to the work she had carried out until 2002.

6. In its replies to the complainant, the Commission explained that it had no general competence to act in favour of EU citizens; it could only act if Community law was affected. The fact that the complainant was given more work than her colleague was neither a sign of discrimination on the basis of ethnic origin, nor a violation of any other provision of Community law. According to the Commission, from the information submitted by the complainant, it was not possible to establish any instance of discrimination or to identify a dimension of European Community law in her case. The Commission also stressed that it had no competence to investigate cases which had taken place before the adoption of Directive No 2000/43/EC on 29 June 2000.

7. On 7 December 2007, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY



8. The Ombudsman opened an inquiry into the following allegations and claims.

Allegations

- The Commission failed to investigate the complainant's complaint relating to (a) discrimination on the basis of her racial or ethnical origin and (b) unequal pay for male and female workers for equal work or work of equal value by her former employer, as well as (c) unfair court proceedings in Germany. In particular, the Commission failed to take into consideration that the alleged discrimination against her continued until after the adoption of Directive 2000/43/EC, which was thus applicable in her case.
- The Commission's failure described above was deliberate.

Claims

The Commission should:

- investigate her complaint; and
- take the necessary steps retroactively to remedy the discrimination against her.

THE INQUIRY

9. The complaint was forwarded to the President of the Commission for an opinion. On 17 June 2008, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations. On 21 August 2008, the complainant submitted her observations.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

10. The Ombudsman recalls that, in accordance with Article 195 of the EC Treaty, he is able to receive and examine complaints about maladministration in the activities of European Community institutions and bodies. No action by any other authority may be the subject of a complaint to him. It is, therefore, not the task of the Ombudsman to examine whether the German courts correctly applied national or European Community law. It is also outside the Ombudsman's mandate to examine the activity of the ECtHR, which is not a European Community institution but rather an independent institution of the Council of Europe.

11. The Ombudsman's assessment in the present case therefore aims at ascertaining whether the Commission correctly handled the complainant's complaint, in which she alleged that she had been racially and sexually discriminated against by German authorities.



A. Allegation of failure properly to investigate the complainant's complaint

As regards the alleged discrimination on the grounds of her racial or ethnic origin

Arguments presented to the Ombudsman

12. According to the Commission, no discrimination against the complainant on grounds of race or ethnic origin, as defined in Directive No 2000/43/EC, could be established. In addition, Directive No 2000/43/EC was adopted approximately 10 years after the alleged facts.

13. In her observations, the complainant pointed out that, in general, female lecturers for foreign languages, who are not of German origin, are forced to work part-time. Most of the University's foreign language lecturers, who were employed on a part-time basis, were female and foreigners. By stating that the facts happened 10 years before the adoption of Directive No 2000/43/EC, the Commission implicitly admitted that it had not investigated her complaint at all. The German Federal Labour Court delivered its ruling on 23 May 2001, that is, subsequent to the adoption of Directive No 2000/43/EC on 29 June 2000. This, in the complainant's view, showed that the Directive was applicable.

The Ombudsman's assessment

14. The Ombudsman considers it useful to recall that Article 2(2) of Directive No 2000/43/EC stipulates that:

" (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. "

15. The complainant has not put forward any evidence that would allow the conclusion to be drawn that female foreign language lecturers, who are not of German origin, are generally forced to work part-time. It appears useful to note that the complainant herself was employed on a full-time contract from 1987 to 1989, when the holder of this post was on parental leave. It is true that the complainant argues that most of the University lecturers for foreign languages employed on a part-time basis were female and foreigners. However, this does not prove that there was discrimination on grounds of racial or ethnic origin. The complainant has forwarded no evidence that foreign language lecturers, who are of German origin, are treated more favourably than their colleagues of non-German origin.

16. The facts that led the complainant to turn to the German courts and, ultimately, to the



European Commission, took place in 1990. The complainant turned to the German courts in 1994. Given that the Directive was not in existence at that time, the Commission's view that it was not relevant for the present case appears to be reasonable. The fact that the judgment of the Federal Labour Court was only delivered in 2001 does not affect this conclusion, since the said judgment concerned the preceding judgment of the Higher Labour Court, which was delivered before the Directive was adopted.

17. In light of the above, and on the basis of the information provided by the parties during the course of the inquiry, the Ombudsman considers that the Commission acted correctly when finding that no discrimination on grounds of race or ethnic origin, as defined in Directive No 2000/43/EC, could be established.

As regards alleged discrimination relating to unequal pay for male and female workers

Arguments presented to the Ombudsman

18. The Commission submitted that, although the complainant referred to Article 141 of the EC Treaty, she did not make any clear allegations of sexual discrimination. In addition, the Commission considered that the situation in which the complainant allegedly earned the same salary as her female colleague, despite having to work two additional hours per week, was not covered by the principle of equal pay between male and female workers.

19. In her observations, the complainant stressed her view that she was only offered a part-time job because of her sex. In universities, most of the foreign language lecturers, who are employed on a part-time basis, were female. She did not complain about the fact that her colleague had to work less, but about the abusive increase in her teaching obligations from 1 April to 1 July 1990. According to Article 141 of the EC Treaty and the case-law of the European Court of Justice, she was entitled to equal treatment.

The Ombudsman's assessment

20. The Ombudsman recalls that Article 141 of the EC Treaty provides as follows:

" 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;



(b) that pay for work at time rates shall be the same for the same job (...) "

21. As the Commission has correctly observed, the fact that the complainant allegedly earned the same salary as her female colleague, despite the fact that she had to work two more hours per week is not covered by the principle of equal pay between male and female workers.

22. Furthermore, the complainant has submitted no evidence to suggest that the increase in her teaching obligations from six to eight hours per week was abusive and constituted an indirect discrimination against women. In the information given by the complainant to the Commission, there is no indication that her employer treated her in a different way than her male colleagues.

23. The complainant has produced no evidence to show that she was only offered a part-time job because of her sex. Although there might be more female persons employed on a part-time basis, this does not mean that it was because of her sex that the complainant was not continuously employed on the basis of a full-time contract.

24. In light of the evidence available, the Ombudsman finds reasonable the Commission's analysis that no breach of the principle of equal pay, as established in Article 141 of the EC Treaty, could be found in the complainant's case.

As regards the allegation of unfair court proceedings in Germany

Arguments presented to the Ombudsman

24. The Commission took the view that it had no power over court proceedings in Germany.

25. In the complainant's view, the Commission was competent to investigate whether the court proceedings had been fair, because they concerned the principle of non-discrimination and therefore Community law.

The Ombudsman's assessment

26. It follows from the established case-law of the Community courts that a Member State's failure to fulfil obligations can, in principle, also be found where a court has infringed Community law.

27. However, and as explained above, the Ombudsman considers that no infringement of Community law has been established in the present case. The complainant's allegation cannot therefore be sustained.

28. With regard to the complainant's allegation that German courts failed to respect her right to a fair trial, as foreseen in Article 6 ECHR, the Ombudsman notes that the European Court of Human Rights in Strasbourg rejected her related complaint in 2005. As observed earlier, it is outside both the Ombudsman's and the Commission's mandate to examine the activity of the ECtHR, which is not a European Community institution, but rather an independent institution of



the Council of Europe.

B. Allegation of deliberate failure properly to investigate the complainant's complaint

Arguments presented to the Ombudsman

29. The Commission considered that it did not fail properly to handle the complainant's request: it answered all her letters and, as far as possible, investigated the issues raised therein, in accordance with its Code of Good Administrative Behaviour.

30. According to the complainant, the Commission did not examine her argument that the discrimination against her lasted beyond the year 2000 and even persisted, since her pension was being calculated on the basis of her part-time work. The Commission should have inquired into the breach of Community law by Germany and should have brought an infringement action in this regard before the European Court of Justice.

The Ombudsman's assessment

31. The Ombudsman finds that there is nothing to suggest that the Commission failed properly to handle the complainant's complaint. The complainant's allegation of a deliberate failure cannot therefore be sustained.

C. The complainant's claims

32. As stated above, the Ombudsman takes the view that the Commission properly investigated the present complaint. In view of this finding, the complainant's claims cannot be sustained.

D. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman finds no maladministration by the Commission as regards the complainant's allegations and claims. The Ombudsman therefore closes the case. The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 December 2008