

Draft recommendation to the European Parliament in complaint 1371/99/IP

Recommendation

Case 1371/99/IP - Opened on 20/12/1999 - Recommendation on 18/05/2001 - Decision on 30/04/2002

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT

On 12 November 1999, the complainants participated in competition EUR/C/22 jointly organised by the European Parliament and the Court of Justice of the European Communities. Having succeeded in the competition, their names were included in the reserve list of successful candidates.

From 1 December 1996 to 1 November 1998, the Parliament has progressively recruited the complainants (2) , all of them at grade C5 step 3 of the career.

In their complaint to the Ombudsman, the complainants alleged to have been discriminated against compared to other candidates who had participated in the same competition, and who were recruited at grade C4 step 3.

THE INQUIRY

The Parliament's opinion

In its opinion on the complaint, the Parliament pointed out that the complainants could have appealed against the institution's decision in relation to their recruitment, by lodging a complaint under Article 90 of the Staff Regulation. In May 1998, three of the complainants complained under Article 90 (1) asking to be reclassified at grade C 4 with effect from their nomination as officials. The complaints were rejected.

Moreover, the Parliament pointed out that, even if the complainants had complained under Article 90 (2), their complaints would have been considered inadmissible because they not would have been lodged within the time limit foreseen by the Staff Regulation, i.e. within three months from the start of the officials' probationary period.

The institution stressed that, as Community Courts have consistently held, only the presence of



new substantial elements could justify the introduction of a complaint under Article 90 (2) for the re-examination of a previous decision concerning recruitment that was not appealed within the time limit. However, if a Court's judgement annulling an administrative act could constitute a new element, this is only *vis à vis* those people who are directly affected by the annulled act. The *Monaco* (3) case law, invoked by the complainants, cannot therefore apply since they have not participated in the same open competition as Mr Monaco.

Moreover, the institution stated that, according to the policy followed by the Parliament in recruitment matters after the entry into force of the new Internal Directives in May 1995, the Appointing authority can nominate an official at a higher grade than the starting grade of his/her category only in exceptional cases, and to attract qualified candidates when extremely complex tasks have to be carried out.

The complainants' observations

In their observations, the complainants basically maintained their original complaint.

THE DECISION

1. The European Parliament's recruitment procedure

1.1 The complainants succeeded in competition EUR/C/22 jointly organised by the European Parliament and the Court of Justice of the European Communities, and were recruited at grade C 5 step 3. In their complaint to the Ombudsman, they alleged to have been discriminated against compared to other candidates who had participated in the same competition, and who were recruited at grade C 4 step 3.

1.2 In its opinion, the Parliament stressed that the complainants would have had the possibility to appeal the institution's decision by lodging a complaint under Article 90 of the Staff Regulations. However, those who had complained, did so when the deadline had already expired.

1.3 Only the presence of new substantial elements could justify the introduction of a complaint under Article 90 (2) for the re-examination of a previous decision concerning recruitment that was not appealed within the time limit. However, if a Court's judgement annulling an administrative act could constitute a new element, this is only *vis à vis* those people who are directly affected by the annulled act. The Parliament pointed out that the judgement of the Court of First Instance in the *Monaco* case, invoked by the complainants, did not apply to their case, since they were not directly affected by the annulled act.

1.4 The Ombudsman notes that the main issue in this case is to determine whether the complainants have been discriminated against by the European Parliament when recruited and if there has been maladministration by the Parliament.

1.5 The principle of non discrimination and of equal treatment is one of the fundamental principles of Community law. As consistently held by Community Courts, it requires that comparable situations should not be treated in a different manner and different situations should not be treated alike unless such treatment is objectively justified (4) .



1.6 In its judgement in case T-92/96 (*Monaco* case), the Court of First instance considered that candidates in the same competition are, in principle, to be considered to be in a similar situation. Furthermore, the Court has stated that an institution breaches the principle of equal treatment and non discrimination if it applies to an official recruited from a competition the provisions of the new Internal Directives which provide for a stricter application of Article 31(2) of the Staff Regulation, whereas other officials recruited from the same competition by the institution before the entry into force of the new Internal Directives were classified according to the previous Internal directives.

The Court considered that the only reference to new rules adopted by the Parliament in the meantime was not an adequate justification to recruit candidates from a same competition with different contractual conditions.

1.7 The Ombudsman considers that it is important to recall that the competition to which the complainants have participated, was organised jointly by the Parliament and the Court of Justice.

However, after the judgement of the Court of First Instance in the above mentioned case, the Court of Justice reclassified, at its own initiative, those civil servants who, after the entry into force of the new Internal Directives, were recruited under less favourable conditions than those applied to candidates recruited on the basis of the previous Internal directives.

1.8 The Ombudsman considers that, even if the *Monaco* judgement does not apply to the complainants as a new element, the appointing authority has the possibility to modify the recruitment conditions of the complainants, by following the example of the Court of Justice.

1.9 On the basis of these considerations, the Ombudsman concludes that the Parliament's decision to recruit the complainants applying to them the new Internal Directives, when other candidates recruited from the same reserve list were classified according to the previous Internal Directives, resulted in a discriminatory treatment for the complainants. The fact that the institution did not act in light of the principle stated by the Court of First Instance in case T - 92/96, and its refusal to reconsider its decision constitutes therefore an instance of maladministration.

In view of the position adopted by the Parliament it does not appear possible to achieve a friendly solution. The Ombudsman therefore considers it appropriate to make the following draft recommendation, in accordance with Article 3 (6) of his Statute.

The draft recommendation

The Parliament should follow the example of the Court of Justice and reclassify the complainants at grade C 4 step 3 with effect from the date of their appointment as civil servants.

The European Parliament and the complainants will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the European Parliament shall send a detailed opinion by 30 September 2001. The detailed opinion could consist of the



acceptance of the Ombudsman's recommendation and a description of the measures taken to implement it.

Strasbourg, 18 May 2001

Jacob Söderman

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/5.

(2) The complainants dates of nomination were the following: Mrs AC. on 01.09.1997; Mrs AL. on 16.06.1997; Mr AL. on 01.05.1998; Mrs AM. on 1.12.1996; Mrs C. on 01.04.1998; Mrs N. on 01.05.1998; Mrs P. on 01.11.1998.

(3) Judgment of the Court of First Instance (Fourth Chamber) of 9 July 1997, *Roberto Monaco v European Parliament* . Case T-92/96. ECR - SC [1997] page IA-0195; II-0573.

(4) - Case 203/86 Spain v Council [1988] ECR 4563, paragraph 25, and Case C-15/95 EARL de Kerlast [1997] ECR I-1961, paragraph 35 - Case C-150/94 United Kingdom v Council [1998] ECR I-7235, paragraph 97.