

## **Draft recommendation to the European Commission in complaint 242/2000/GG**

Recommendation

**Case 242/2000/GG - Opened on 24/02/2000 - Recommendation on 10/05/2001 - Special report on 24/02/2000 - Decision on 17/12/2002**

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

### **SUMMARY**

The complaint in this case concerns the rules adopted by the European Commission with regard to national experts on secondment to the Commission. According to Article 2 (1) of the Rules, such national experts must work on a full-time basis throughout the period of secondment.

The complainant, a UK civil servant who has a little son, applied for a post as a national expert at the European Commission. However, she wished to be able to work there on a part-time basis in order to be able to look after her child. When she was informed that national experts had to work on a full-time basis, the complainant reluctantly had withdrawn her application. She then complained to the European Ombudsman, arguing that the relevant rule was discriminatory on the grounds of sex.

In an effort to achieve a friendly solution, the Ombudsman suggested to the Commission to abolish the relevant rule. In its reply, the Commission informed the Ombudsman that a new decision on the rules applicable to national experts would be drawn up later in 2001 and that it was envisaged that the relevant rule would be abolished on that occasion. However, the Commission failed to provide a concrete timetable for this proposed change.

The Ombudsman therefore makes a draft recommendation that the Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time as soon as possible.

### **THE COMPLAINT**

The complainant works in the Department of the Environment, Transport and the Regions (DETR) in London. In November 1999, she saw a notice of vacancy in which the European Commission was advertising posts of seconded national experts who were to work in the



Commission's Directorate-General VII (Transport). Since the complainant had been working in the transport sector beforehand, she submitted an application. The DETR agreed to support her application and to pay her salary for the duration of her secondment.

Article 2 (1) of the European Commission's Rules applicable to national experts on detachment to the Commission (2) provides that national experts on secondment to the Commission shall work "on a full-time basis throughout the period of detachment". The complainant has a son who was 11 months old at the time. When the complainant learnt about the said rule, she contacted the head of unit whose name was mentioned in the notice of vacancy in order to ask whether she could work part-time so that she could spend some time with her son. The complainant was prepared to work for four days a week. The head of unit told her that he saw no reason why she should not work on that post part-time.

However, when in the absence of further news the complainant rang the Commission again in January 2000, she was told that there had been a reorganisation and that the relevant post was now with another head of unit. The latter informed the complainant that he would not consider her application unless she was prepared to work full-time. In these circumstances, the complainant had to withdraw her application.

The complainant considered that the rule against part-time working was discriminatory on the grounds of sex since it was likely to affect a greater proportion of women than men as women generally have more childcare commitments than men.

## THE INQUIRY

The complaint was sent to the Commission for its comments.

### **The opinion of the Commission**

In its opinion, the Commission made the following comments:

The White Paper adopted by the Commission on 1 March 2000, set out a reform programme for a fundamental review of working practices, the programming of activities and the management of human and financial resources. The Commission was committed to be a model employer. The principle of the systematic consideration of gender issues would be a basic parameter for the reform. Among other actions, measures would be taken to facilitate part-time working.

Seconded national experts (SNE) came to work for the Commission for a relatively short period (three years maximum). The number of posts for SNEs was relatively limited and decided by the budgetary authority. The object of the secondment was twofold. On the one hand, the Commission could use valuable expertise which the SNE might bring. On the other hand, the SNE's time in Brussels was to be regarded as a form of training and career development which was of value to the employer who seconded him or her. Since this was a short-term measure, which involved considerable investment for the seconding employer and for the Commission (the seconding employer had to go on paying the basic remuneration, while not benefiting directly and immediately from the person's services; the Commission had to pay a top-up living



allowance in Brussels), it was necessary to ensure that both parties had maximum mutual benefit not only in terms of work done, but in terms of training and experience acquired. It was clear that a person who worked part-time could not acquire the same experience in a three-year period; equally, the idea of extending the secondment, for example to six years in the case of part-time working, could not readily be envisaged, since it would then no longer be the essentially short-term arrangement normally implied by the notion 'secondment'. In view of these special considerations, the Commission's current policy was that these had to be full-time posts.

This rule was not discriminatory on the grounds of sex and applied equally to all available posts of SNEs to be appointed by the Commission. The decision to seek full-timers was merely a response to an objective need for a person to work a given number of hours, independently of the sex of the person to be appointed.

However, without prejudice to the above explanations, the Commission was examining the possibility of future part-time work for SNEs where this option would be compatible with the interests of the service.

#### **The complainant's observations**

In her observations on this opinion, the complainant took the view that it was wrong for the Commission to claim that just because a person could obtain more experience by working more hours it was not possible to obtain a benefit at all if he or she worked fewer hours. The Commission's argument was in any event based on a false premise, i.e. that all SNEs worked full-time for three years. As a matter of fact, SNEs could work for periods ranging from three months to three years. The vacancy notice to which the complainant had replied referred to secondments ranging from six months to three years. As far as the complainant was aware, nobody had ever suggested that someone who worked for less than three years did not obtain any benefit from the experience.

Her employer was more than happy to continue paying her salary during the secondment. In any event, it was more advantageous for an employer to second a part-timer rather than a full-timer since he had to pay less and in either case did not obtain any direct benefit. Since the Commission's contributions amounted to living expenses, these would need to be paid at the same rate for full-timers and part-timers since the cost of living was the same. Such considerations could however hardly be regarded as an objective justification in a case of indirect discrimination.

#### **Further inquiries** *Request for further information*

In view of the above, the Ombudsman concluded that he needed further information in order to deal with the complaint. He therefore asked the Commission to provide figures as to the number of its officials working part-time and as to the number of SNEs. The Ombudsman also asked the Commission to specify how many of these were women.

#### *The Commission's reply*

In its reply, the Commission informed the Ombudsman that in September 2000, out of a total of 5 710 category A officials, 106 were working part-time of whom 87 were women. It also explained that 713 SNEs were working for the Commission, of whom 213 women.



The Commission also pointed out that the number of SNEs available to the Commission was limited by the budgetary credits available. These credits were allocated in terms of man/years. SNEs working part-time but receiving the full daily allowances would therefore effectively reduce the total number of SNEs available to the Commission.

#### **The complainant's observations**

No observations on this reply were received from the complainant.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

#### **The Ombudsman's analysis of the issues in dispute**

After careful consideration of the opinion and observations and the results of the further inquiries, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims.

The Ombudsman's provisional conclusion was that the prohibition on SNEs to work part-time could be an instance of maladministration.

#### **The possibility of a friendly solution**

On 31 January 2001, the Ombudsman submitted a proposal for a friendly solution to the Commission. In his letter, the Ombudsman suggested that the Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time.

In its reply of 22 March 2001, the Commission pointed out that a new decision on the rules applicable to seconded national experts was being drawn up in the context of the current reform process. According to the Commission, this new decision, which should be adopted later in 2001, envisaged the abolition of the rule prohibiting national experts on secondment to the Commission from working part-time.

In her observations sent on 30 April 2001, the complainant informed the Ombudsman that she was delighted with his findings and that the Commission intended to abolish the relevant rule. However, she expressed concern at the fact that the change would not be made until later in 2001 and that no concrete date had been given. The complainant considered it unfair that the discriminatory rule should remain in place for several more months, particularly in view of the fact that the Commission had been aware of her complaint for more than a year and thus could have taken steps to amend its rules much sooner.

## **THE DECISION**

### **1 Prohibition on part-time work**

1.1 The complainant claimed that Article 2 (1) of the European Commission's Rules applicable to national experts on detachment to the Commission (3) (the "Rules") which provides that national experts seconded to the Commission shall work "on a full-time basis throughout the period of detachment" was discriminatory on the grounds of sex.

1.2 The Commission took the view that the said rule was not discriminatory since it applied to all



available posts of seconded national experts ("SNEs") who were to work for the Commission. In the Commission's view, the decision to seek full-timers was merely a response to an objective need for a person to work a given number of hours, independently of the sex of the person to be appointed. The Commission also claimed that in view of the considerable investment that a secondment involved for both the seconding employer and the Commission, it was necessary to ensure that both parties had maximum mutual benefit not only in terms of work done, but also in terms of training and experience acquired by the SNE. Finally, the Commission pointed out that the number of SNEs available to the Commission was limited by the budgetary credits available. These credits were allocated in terms of man/years. The Commission claimed that SNEs working part-time but receiving the full daily allowances would therefore effectively reduce the total number of SNEs available to the Commission.

1.3 The Ombudsman noted that national experts seconded to the Commission continue to receive their salary from their employer. However, the Commission grants a top-up living allowance in order to compensate for the higher cost of living in Brussels.

1.4 According to the data provided by the Commission, 106 of its 5 710 category A officials were working part-time in September 2000. Of these 106 officials, 87 (or approximately 82,1 %) were women.

1.5 The relevant rule that prohibits SNEs from working part-time is applicable to all applicants for such posts, independently of the sex of the person to be appointed. However, it followed from the established case-law of the Court of Justice that national provisions or rules relating to access to employment and working conditions "discriminate indirectly against women where, although worded in neutral terms, they work to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex" (4) .

1.6 The Ombudsman considered that this case-law was also applicable to provisions or rules adopted by the institutions and bodies of the European Communities themselves. It was to be noted that Article 21 (1) of the Charter of fundamental rights of the European Union (5) provides in general terms that "[a]ny discrimination based on any ground such as sex" shall be prohibited.

1.7 Given that the relevant rule prohibited SNEs from working part-time, it was not possible directly to ascertain whether it disadvantaged women against men in the sense of the case-law of the Court of Justice since there appeared to be no SNEs who work part-time. The Ombudsman considered, however, that the number of comparable Commission officials working part-time should be considered in this context. According to Article 4 (1) of the Rules, a national expert must, in order to qualify for a secondment to the Commission, have at least three years' experience of administrative, advisory or supervisory duties "in a grade equivalent to Categories A and B as defined in the Staff Regulations of Officials of the European Communities". According to the figures provided by the Commission, some 82,1 % of its category A officials who were working part-time were women. There was nothing to suggest that candidates for SNE posts should be substantially less interested in the possibility of part-time work than



comparable officials at the Commission itself. In the Ombudsman's view, it thus followed from the above figures that the prohibition on part-time working for SNEs was likely to "work to the disadvantage of a much higher percentage of women than men".

1.8 In these circumstances, it was for the Commission to establish that the prohibition on part-time work for SNEs was justified by objective factors unrelated to any discrimination on grounds of sex.

1.9 The Commission referred in this context to the interests of three parties: The SNE, the seconding employer and the Commission itself. The Ombudsman considered that it had not been established that the interests of the first two should make it necessary to prevent SNEs from working part-time. In any event, the decision should be left to the two parties concerned themselves, i.e. the applicant and the employer.

1.10 In so far as the Commission's own interest was concerned, the Ombudsman acknowledged that the Commission might benefit more from an SNE working full-time than from one working on a part-time basis only. However, secondments varied between three months and a maximum of three years. It was thus not excluded that any possible disadvantages in terms of services provided by the SNE might simply be offset by prolonging the secondment within the above-mentioned limits. The Ombudsman did not rule out the possibility that there could be posts which required the presence of an SNE on a full-time basis. However, the Commission had not shown that such a need (if any) would apply to all SNE posts.

1.11 The Commission's most concrete argument related to costs. However, according to the established case-law of the Court of Justice budgetary considerations as such cannot justify discrimination against one of the sexes (6) . Furthermore, whilst the financial impact of allowing SNEs to work part-time could not be calculated with any precision at present, the figures provided by the Commission with regard to its own officials seemed to suggest that it would not be significant.

1.12 The Ombudsman concluded, therefore, that the prohibition on SNEs to work part-time constituted an instance of maladministration.

## **2 Conclusion**

2.1 On the basis of his findings, the Ombudsman submitted the following proposal for a friendly solution to the Commission:

The European Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time.

2.2 In its reply, the Commission pointed out that a new decision on the rules applicable to seconded national experts was being drawn up in the context of the current reform process. According to the Commission, this new decision, which should be adopted later in 2001, envisaged the abolition of the rule prohibiting national experts on secondment to the Commission from working part-time. However, no concrete date was given. This means that the Commission intends to continue applying the relevant rule without giving reasons as to why the



change suggested by the Ombudsman needs to be delayed. The Ombudsman considers that this is not satisfactory.

2.3 The Ombudsman therefore makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

**The draft recommendation**

The European Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time by 30 September 2001 at the latest.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion before 30 September 2001. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

Strasbourg, 10 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, page 15.

(2) Commission Decision of 7 January 1998 (C(97)3402), amended by Commission Decision of 3 February 1999 (C(99)220).

(3) Commission Decision of 7 January 1998 (C(97)3402), amended by Commission Decision of 3 February 1999 (C(99)220).

(4) Case C-226/98 *Jørgensen* ECR [2000] I-2447 paragraph 29.

(5) The text is reproduced in OJ 2000 C 364, p. 1.

(6) Case C-226/98 loc. cit., paragraph 39.