

Decision of the European Ombudsman closing his inquiry into complaint 224/2005/ELB against the European Commission

Decision

Case 224/2005/ELB - Opened on 31/01/2005 - Recommendation on 02/07/2008 - Decision on 04/12/2009

THE BACKGROUND TO THE COMPLAINT

1. The complainant took part in Selection Procedure COM/R/A/01/1999, ('the Selection Procedure') organised by the European Commission. The Selection Procedure aimed to draw up a reserve list of temporary agents in the field of Research.
2. The Selection Committee did not place the complainant on the reserve list. She then lodged an appeal with the Court of First Instance ('the Court') against the Selection Committee's decision [1] . The Court annulled the Selection Committee's decision on the grounds that it was vitiated by irregularities which led to a breach of the principle of equal treatment of candidates. Other candidates who took part in the Selection Procedure also appealed to the Court [2] . The decisions of the Selection Committee in relation to those candidates were also annulled for identical reasons.
3. After the decisions had been annulled, the Commission invited the complainant, and the other candidates who had appealed, to take part in new series of oral tests. Following the new series of oral tests, the Selection Committee again did not place her on the reserve list.
4. Other candidates who had taken part in the new series of oral tests appealed to the Court against the second decision to exclude them from the Selection Procedure (Cases T-156/03 and T-400/03 [3]). The Court again annulled the Commission's decisions on the grounds that they were vitiated by irregularities which led to unequal treatment of candidates.
5. The complainant, instead, lodged a complaint with the Ombudsman against the Commission's second decision to exclude her from the Selection Procedure.

THE SUBJECT MATTER OF THE INQUIRY



6. The complainant alleged the following:

- The Commission failed to comply with the principle of equality of treatment of candidates.
- The Commission failed to comply with Article 233 of the EC Treaty and the judgment of the Court in Case T-92/01 [4] .

7. The complainant claimed the following:

- The second decision of the Selection Committee should be annulled, her name should be included on the reserve list, and the validity of the list should be extended.
- She should be compensated for the expenses she incurred for the procedure before the Court, for having to resit the Selection Procedure, and for material and non-material loss, which she estimated at EUR 150 000.

THE INQUIRY

8. The complaint was sent to the Ombudsman on 17 January 2005. On 31 January 2005, the Ombudsman opened an inquiry and sent the complaint to the Commission. On 4 May 2005, the Commission sent the Ombudsman its opinion regarding the complaint, which was then forwarded to the complainant for observations. The complainant sent her observations to the Ombudsman on 22 July 2005.

9. On 18 January 2006, the Ombudsman asked the Commission to allow his services to inspect the file. The inspection took place on 13 February 2006. On 16 March 2006, the complainant was informed of this inspection and received a copy of the inspection report.

10. On 29 September 2006, and 2 February 2007, the Ombudsman requested further information from the Commission. On 24 November 2006, and 15 March 2007, the Commission replied to the Ombudsman's requests. The Ombudsman forwarded the Commission's replies to the complainant and invited her to make observations, which she sent on 30 May 2007.

11. On 29 January 2008, the Ombudsman addressed a friendly solution proposal to the Commission. On 30 April 2008, the Commission sent its reply to the Ombudsman. On 20 May 2008, a copy of this reply was sent to the complainant, inviting her to make observations, which she sent on 5 June 2008.

12. On 2 July 2008, the Ombudsman addressed a draft recommendation to the Commission. On 1 October 2008, the Commission sent its detailed opinion concerning this draft recommendation. On 8 October 2008, a copy of this detailed opinion was forwarded to the complainant, inviting her to submit observations, which she sent on 21 November 2008.

13. On 4 December 2008, the Ombudsman wrote to Commissioner Potočník about the complaint. The Commissioner's reply was received on 19 January 2009 and was forwarded to the complainant, who made observations on 25 March 2009. Commissioner Potočník provided further clarification by letter dated 11 June 2009, which was sent to the complainant, who



submitted her observations on 14 September 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of failure to comply with the principle of equality of treatment of candidates, the EC Treaty and a Court judgment, as well as related claims

Arguments presented to the Ombudsman

14. The complainant argued that, as regards the second series of oral tests, the Commission failed to comply with the principle of equality of treatment of candidates, in particular with regard to the composition of the Selection Committee, the content of the oral test, and the comparative assessment of candidates' merits. As regards the Commission's failure to comply with Article 233 of the EC Treaty, and the judgment of the Court in Case T-92/01, she argued that the Commission should have annulled the Selection Procedure. If it had not been possible to annul the Selection Procedure, she should have been compensated for being excluded from the reserve list.

15. On two occasions, the Ombudsman asked the Commission to inform him whether it considered that its initial opinion on the complaint, concerning its compliance with Case T-92/01 and the issue of the comparative assessments of candidates, was still justifiable in view of Cases T-156/03 and T-400/03 [5]. These two cases also dealt with the Selection Procedure at issue in the present complaint. Like the complainant, the applicants in those cases had been excluded from the Selection Procedure after the initial oral tests and, again, after the additional oral tests, organised as a result of the Court's annulment of the Selection Committee's decision. Unlike the complainant, both applicants again appealed to the Court against the Selection Committee's second decision not to put their names on the reserve list. In both cases, the Court annulled the Selection Committee's decisions.

16. The Commission considered that the only effect of Cases T-156/03 and T-400/03 was to annul the individual decisions concerning the two applicants. Since the complainant did not challenge the Selection Committee's second decision before the Court, she could not take advantage of these two cases. The Commission further acknowledged that, had the complainant challenged this decision before the Court, as had the two applicants, she would probably have benefited from a similar judgment.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

17. The Ombudsman noted that the complainant's case was identical to Cases T-156/03 and T-400/03. The facts were the same, and the arguments she presented to the Ombudsman were similar to the arguments presented in Cases T-156/03 and T-400/03.



18. The Ombudsman further noted that, in Cases T-156/03 and T-400/03, the Court concluded that the organisation of a new series of oral tests for the applicants was not the appropriate way to comply with the annulment of the Selection Committee's first decision. It took the view that, in the second procedure, the Commission failed to correct the irregularities found in the initial procedure. Indeed, it found that the course of action adopted by the Commission in the second procedure aggravated the irregularities. The Court considered that the Commission could have organised an autonomous specific selection procedure for the applicants, or, in consultation with the applicants, found a fair solution to the problems resulting from their illegal exclusion from the Selection Procedure. It added that, when the execution of a judgment is particularly difficult, the institution may take a decision which would compensate fairly the applicants for the disadvantage suffered because of the illegality of the annulled act [6] .

19. The Ombudsman fully acknowledged that the *res judicata* effect of the above-mentioned case-law did not extend to the complainant's case [7] . He also understood that the Selection Committee's decision against the complainant was definitive, which implied that the "legality" of that decision could not be challenged. However, he insisted that the mere fact that the "legality" of the decision could no longer be challenged before the Court did not imply that the administration did not, in accordance with principles of good administration, have an obligation to draw all reasonable conclusions from Community Court rulings when dealing with a similar case brought before the Ombudsman. This reasoning is all the more applicable in cases where the facts and arguments presented to the Ombudsman are completely analogous to the facts and arguments presented to the Court.

20. The Ombudsman pointed out that his mandate is to deal with maladministration, which occurs when a public body fails to act in accordance with a rule or principle which is binding upon it. His review is, therefore, broader than that of judicial review. That is to say, while it includes compliance with legal rules, it goes beyond issues of legality.

21. The Ombudsman also stated that the Community Courts have ruled that the Treaty gives EU citizens an alternative remedy to that of bringing an action before the Community Court, with an eye to protecting their rights [8] . The Ombudsman considered that, in its replies to his requests for further information, the Commission effectively rejected the specific role of the Ombudsman, insofar as it refused even to consider that the reasoning of the above-mentioned Court cases could be relied upon by a complainant in a case brought before the Ombudsman.

22. The Ombudsman noted that the Commission admitted that, had the complainant gone before the Court and challenged the Selection Committee's second decision not to include her name on the reserve list, the decision would probably have been annulled.

23. Thus, the Ombudsman considered that the Commission implicitly admitted that it failed, as regards the complainant, properly to execute the Court's judgment in Case T-91/02, which annulled the first decision of the Selection Committee.

24. The Ombudsman also referred to the case-law concerning "loss of an opportunity" [9] .



25. His provisional conclusion was that the Commission failed properly to take due account of the Court's judgment in Case T-91/02, and that this constituted an instance of maladministration. He suggested that the Commission should choose to apply to the complainant's case the conclusions derived from Cases T-156/03 and T-400/03, and could consider compensating her for the damage she suffered through the loss of the opportunity to sit the test properly.

The arguments presented to the Ombudsman after his friendly solution proposal

26. The Commission rejected the Ombudsman's proposal for a friendly solution. It admitted that the complainant's situation was similar to that of the applicants in Cases T-156/03 and T-400/03 and that, had the complainant challenged the Selection Committee's second decision before the Court, she would probably have benefited from a similar judgment. It argued, however, that the complainant failed to lodge an appeal before the Court and that, therefore, the decision concerning her had become definitive. If the Commission were to treat the complainant in the same way as it treated the two applicants, it would be in breach of the principle of legal certainty.

27. The Commission pointed out that the complainant had appealed before the Court the Commission's decisions concerning eight other recruitment procedures and had been awarded compensation for loss of opportunity to be recruited [10] .

The Ombudsman's assessment leading to a draft recommendation

28. The Ombudsman considered the Commission's position to be wrong for the following reasons.

29. The Ombudsman underlined that Articles 21 and 195 of the EC Treaty provide for the right to complain to the Ombudsman. With a view to protecting their rights vis-à-vis the Community Administration, these Articles offer EU citizens an *alternative* remedy to that of bringing an action before the Community Courts [11] . These Articles should be interpreted and applied consistently in line with their purpose, and in such a way as to preserve their useful effect (' *effet utile* '). With this in mind, the Ombudsman examined the complaint made to him concerning a Selection Committee's decision in a recruitment procedure where the Community Courts had already annulled analogous decisions made by the same Selection Committee. Therefore, when he requests that the Commission assess the matter, taking into account (a) the findings of the pertinent court decision, in which the Court identified errors made by the same Selection Committee, and (b) the above Treaty Articles, he considers that the Commission cannot merely refer to the limited, *ratione personae* , effect of the court decision.

30. The Ombudsman understands the implications of the *res judicata* effect of a court decision. However, he is equally mindful of the overall general requirement that the Commission should act lawfully towards a candidate who turns either to the Ombudsman or the courts. This requirement, and the right which the Treaty gives to EU citizens to complain to the Ombudsman, mean that the Commission should, when dealing with inquiries initiated by the Ombudsman in



response to citizens' complaints, adequately address problems of legality which he has identified. This includes problems of legality identified by reference to a court decision concerning other candidates whose circumstances are sufficiently similar, or even completely analogous, to those of the complainant. In light of these considerations, therefore, the Ombudsman made the following draft recommendation:

" The Commission should reconsider its position and take measures to provide an effective remedy to the complainant for the unlawful decision adopted by the Selection Committee in this case. "

The arguments presented to the Ombudsman after his draft recommendation

31. The Commission argued that it could not accept the Ombudsman's draft recommendation, since doing so would require it to adopt an arbitrary decision.

32. In her observations, the complainant expressed her disappointment with the Commission's reply. According to her, the Commission's rejection of the Ombudsman's draft recommendation undermined the role of the Ombudsman.

33. The complainant also informed the Ombudsman about on-going developments relating to the applicants in Cases T-156/03 and T-400/03. According to her, the Commission offered the applicants in Cases T-156/03 and T-400/03 three months' salary as compensation. The applicants considered this to be insufficient. The Commission subsequently asked them to assess the amount of their loss. The complainant asked the Ombudsman not to close her case before the applicants obtained a reply from the Commission.

34. The complainant hoped that the Ombudsman would be able to find a fair solution to her complaint.

The Ombudsman's correspondence with Commissioner Potočnik

35. The Ombudsman requested Commissioner Potočnik's personal intervention to ensure a thorough review of the Commission's position in this case. He did so because he wished to avoid a situation in which the Commission might appear to be undermining the fundamental right given to citizens by the Treaty to complain to the Ombudsman, and to be treating the complainant unequally, when refusing to grant her compensation on the grounds that the Court had previously awarded her damages in an unrelated case.

36. On 19 January 2009, Commissioner Potočnik, having carried out a review, informed the Ombudsman that he found the Commission's position in relation to this case to be justified. He argued that the Commission's inability to offer the same financial compensation to the complainant as that received by the applicants in Cases T-156/03 and T-400/03, does not undermine the fundamental right given by the Treaty to complain to the Ombudsman, or the Ombudsman's authority. Commissioner Potočnik went on to point out that the complainant had already obtained financial compensation in connection with Case T-10/02. That case concerned



other selection procedures in which she had unsuccessfully participated. The complainant was compensated in that case because, as a result of the Commission's relevant decision, she had lost a serious opportunity to be recruited. According to the Commission, it would be impossible to compensate her twice for having lost a serious opportunity to be recruited.

37. According to Commissioner Potočnik, the compensation to be granted to the applicants in Cases T-156/03 and T-400/03 would take into account the elements used to determine the compensation already awarded to the complainant in Case T-10/02. Therefore, the complainant was treated in the same way as the applicants in Cases T-156/03 and T-400/03.

38. According to Commissioner Potočnik, the complainant's legal situation differs from that of the other applicants insofar as she did not appeal against the Commission's second decision not to include her name on the reserve list. According to the Commissioner, the fact that the complainant lodged a complaint with the Ombudsman does not entitle her to claim financial compensation. He added that the present complaint was lodged more than one year after the expiry of the time-limit to make an application before the Court of First Instance. The Commissioner pointed out that lodging a complaint with the Ombudsman does not suspend the time-limits in legal proceedings. Such a complaint cannot reopen time-limits to obtain financial compensation which can only be obtained through an application before a court.

39. The Commissioner also pointed out that, according to the case-law of the Community Courts, a citizen must choose between going to court or lodging a complaint with the Ombudsman. Moreover, the Ombudsman must end his inquiry into a complaint where legal proceedings are in progress concerning the same facts. In the present case, the Commissioner wondered if it could not be concluded that the object of the present complaint is identical to Case T-10/02. The objectives of both procedures are the same, namely, obtaining compensation for the loss of a serious opportunity to be recruited by the Commission.

40. The Commissioner concluded that the Commission could not accept the Ombudsman's draft recommendation because it would mean that complaining to the Ombudsman could be considered to be an additional remedy, allowing complainants to circumvent statutory rules in order to obtain financial compensation which only courts can grant.

41. In her observations, the complainant maintained her position. She pointed out that she lost a further opportunity to be recruited in another selection procedure. She explained how the compensation she received from the Court had been calculated and stated that it covered only part of her loss. She considered that the Commission's position appears to breach the Treaty provisions concerning the role of the Ombudsman. Moreover, the Commission does not comply with the principle of equal treatment for similar cases. Finally, she indicated that, on the basis of the calculation made by the Court in Case T-10/02, she should receive compensation amounting to EUR 11 598, plus EUR 10 000 for moral prejudice, in connection with the Selection Procedure. This total amount of EUR 21 598 corresponds to three months' salary.

42. In his further letter of 11 June 2009, Commissioner Potočnik clarified that, as regards the right to compensation in cases of maladministration, the Commission recognises that a person



who has suffered moral harm may have a right to financial compensation. He acknowledged that, in the past, the Commission has paid such compensation, even when it was not bound to do so by a court decision, but acting on an *ex gratia* basis. He went on to state that the Commission will continue to do so, if necessary. As regards the complainant, the Commission considered that it is impossible to pay compensation because the complainant has already received EUR 92 785 as compensation for potential lost earnings, following her appeal before the Court of First Instance in Case T-10/02. Although this court procedure concerned a different selection procedure than the one which gave rise to the Ombudsman's inquiry, the loss suffered by the complainant was the same, namely, the loss of a serious opportunity to be recruited by the Commission. Therefore, the Commission cannot pay compensation twice for the same loss.

43. In her observations, the complainant again maintained her position. She again indicated that she lost an additional opportunity to be recruited after the Selection Procedure. Since the Commission refuses to compensate the complainant, it should offer an alternative to the non-execution of the Court's judgment. Moreover, she argued that the Commission had not complied with the principle of equal treatment, given that it compensated the applicants in Cases T-156/03 and T-400/03, but refused to compensate her.

44. Finally, she repeated her argument that the Commission breached the provisions of the EC Treaty concerning the European Ombudsman. She considered that, by granting her compensation amounting to three months' salary, the Commission could comply with the Ombudsman's recommendation, the Court's decision, the conclusion in Joined Cases T-331/00 and T-115/01 [12] , and the principle of equality of treatment. She added that she might send her file to the Court of Auditors. She also thanked the Ombudsman for his work on her case.

The Ombudsman's assessment after his draft recommendation and his correspondence with Commissioner Potočník

45. Articles 21 and 195 of the EC Treaty provide for the right to complain to the European Ombudsman. The right to complain to the European Ombudsman offers EU citizens who encounter problems with European public administration an alternative to bringing an action before the Community Courts.

46. While the Commission itself cannot annul the decisions of a selection committee [13] , it has the power to choose to address adequately problems of legality in the work of a selection committee, which have been identified by the Court or the Ombudsman. This could include inviting the selection committee to take a new decision with a view to correcting the errors committed. If this is not possible, the Commission could choose to compensate the parties concerned for any damage suffered as a result of the selection committee's errors.

47. The present complaint concerns a selection committee decision taken in a selection procedure. In Cases T-156/03 and T-400/03, the Court annulled completely analogous decisions made by the same Selection Committee in the same Selection Procedure. The complainant in the present case decided to lodge a complaint with the Ombudsman instead of turning to the Court. Had she turned to the Court, the Ombudsman is of the view that the Court



would have reached the same conclusion as regards the irregularities of the Selection Procedure, namely, it would have annulled the Selection Committee's decision and considered that the organisation of a new series of oral tests was also not appropriate in the complainant's case. The Commission itself agrees that, had the complainant turned to the Court, the Court would have reached the same conclusion as regards the irregularities of the Selection Procedure.

48. While, as noted above, the Commission itself cannot annul the decision of the Selection Committee in relation to the complainant, even though the said decision would be vitiated by exactly the same errors identified by the Court in Cases T-156/03 and T-400/03. It is, however, certainly within the power of the Commission to choose to address adequately the problems of legality, identified by the Court, in the work of a selection committee. In sum, the Commission could choose to compensate the complainant for any damage suffered as a result of the Selection Committee's error in her case.

49. The Ombudsman applauds the fact that, although the Commission was initially of the view that a complaint to the Ombudsman could not lead to financial compensation, it subsequently clarified that, in cases of maladministration, it has, where appropriate, made *ex gratia* payments. The Ombudsman considers this to be an important clarification, which he welcomes.

50. The Commission went on to note that, in the present case, it cannot compensate the complainant because she had already received compensation as result of Case T-10/02 for having lost an opportunity to be recruited by the Commission. Therefore, it considers that it cannot compensate her twice for the same loss.

51. It emerges from the Commissioner Potočnik's letters of 19 January 2009 and 11 June 2009 that the complainant was already compensated for the negative consequences resulting from losing an opportunity to work within a Community institution during the period from 1 April 2001 until 31 March 2006 [14]. The Ombudsman fully agrees that the complainant cannot be compensated twice for the same loss. In sum, if the complainant has already been compensated for the loss of an opportunity to be recruited during a given period, she cannot be compensated for other similar opportunities lost in the same period. While the error committed by the institution may indeed concern a separate competition, the damage incurred, that is, the loss of opportunity to work for the said institution, overlaps with the loss of opportunity for which she has already obtained compensation. The Ombudsman notes, however, in this respect, that there is no guarantee that, had the complainant passed the Selection Procedure, any new contract which she could have obtained would have extended beyond the period for which she has already been compensated, namely, beyond 31 March 2006. He thus agrees that additional payments in relation to that same damage would be unwarranted.

52. The Ombudsman points out, however, that while the complainant may not be entitled to additional compensation, this does not mean that the Commission did not commit an error in how it dealt with the present case. The Ombudsman considers that, in order to deal appropriately with the consequences of the annulments of the Selection Committee's decisions by the Court of First Instance in Cases T-156/03 and T-400/03, it would have been necessary



for the Commission first to apologise to the complainant for the errors made in the Selection Procedure, and second to explain, in detail, just as it eventually did in the course of the Ombudsman's investigation of the case, why it considered that, in her specific case, awarding her additional compensation could not be justified.

53. Therefore, the Ombudsman maintains his finding of maladministration, made in his friendly solution proposal and in his draft recommendation, to the effect that the Commission failed properly to take due account of the Court's judgment in Case T-91/02 and to draw the appropriate conclusions from the rulings of the Court in Cases T-156/03 and T-400/03. While the Ombudsman would normally seek another friendly solution with a view to requesting the Commission to apologise to the complainant, he considers that, given the time already taken to deal with the present inquiry, the preferred course of action is to close the case with a critical remark below.

54. The Ombudsman points out that he made a similar draft recommendation to EPSO in connection with complaint 2826/2004/PB. He underlines that EPSO went on to accept his position, thereby ensuring the legality of EU recruitment procedures it organises.

55. The Ombudsman finally notes that the Commission mentioned that the complainant lodged a complaint with the Ombudsman one year after the expiry of the time-limit to go to court. He points out that, according to Article 2.4 of his Statute, a complaint shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Ombudsman considers that the Commission failed properly to take due account of the Court's judgment in Case T-91/02 and to draw the appropriate conclusions from the rulings of the Court in Cases T-156/03 and T-400/03. This constitutes an instance of maladministration.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 4 December 2009

[1] Case T-92/01 *Girardot v Commission* [2002] ECR-SC I-A-163 and II-859.



[2] Cases T-102/01 *Pérez-Díaz v Commission* [2002] ECR-SC I-A-165 and II-871 and Cases T-182/01 *Bachotet v Commission* , judgment of 24 September 2002, not published.

[3] Case T-156/03 *Pérez-Díaz v Commission* [2006] ECR-SC I-A-2-135 and II-A-2-649; and Case T-400/03 *Bachotet v Commission* [2006] ECR-SC I-A-2-141 and II-A-2-669.

[4] Case T-92/01 *Girardot v Commission* , cited above.

[5] Case T-156/03 *Pérez-Díaz v Commission* and Case T-400/03 *Bachotet v Commission* , cited above.

[6] Case T-156/03 *Pérez-Díaz v Commission* , cited above, paragraphs 57-64 and Case T-400/03 *Bachotet v Commission* , cited above, paragraphs 35-42.

[7] Case C-310/97 *Commission v Assi Domän Kraft Products and Others* [1999] ECR I-5363, paragraphs 49-64.

[8] Case T-193/04 *Tillack v Commission* [2006] ECR II-3995, paragraph 128.

[9] Cases T-402/03 *Katalarianakis v Commission* [2007], not yet reported; T-430/03 *Dascalu v Commission* [2007], not yet reported and T-166/04 *C. v Commission* [2007], not yet reported.

[10] Case T-10/02 *Girardot v Commission* [2004] ECR-SC I-A-109 and II-483 and Case C-348/06 P *Commission v Girardot* , judgment of 21 February 2008.

[11] Case T-193/04 *Tillack v Commission* , cited above, paragraph 128.

[12] Joined Cases T-331/00 and T-115/01 *Bories v Commission* [2003] ECR-SC IA-309 and II-1479.

[13] See Case T-306/04 *Luxem v Commission* [2005] ECR-SC II-1209, paragraphs 22-24.

[14] The compensation which the complainant received in Case T-10/02 was calculated on the basis of the difference in earnings between a position at the Commission and the complainant's position within the French public service from 1 April 2001 until 31 March 2006. This difference, amounting to EUR 185 570, was modified by 0.5, which corresponds to the loss of a "serious opportunity" to be recruited.