

Draft recommendation of the European Ombudsman in his inquiry into complaint 413/2008/BB against the European Centre for the Development of Vocational Training

Recommendation

Case 413/2008/BB - Opened on 16/04/2008 - Recommendation on 05/01/2010 - Decision on 08/04/2010

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a university professor. In 2004, he entered, for the first time, into a service contract with the European Centre for the Development of Vocational Training (Cedefop). Cedefop is a European agency that helps promote and develop vocational education and training in the European Union. On the basis of this contract, he drafted a scientific paper ('the 2004 report'), which was later published by Cedefop. The complainant was cited as the author on its cover page. [1]

2. On 15 June 2006, the complainant signed a further service contract [2] ('the Contract') with Cedefop to draft a new scientific paper ('the 2006 report').

3. The complainant's 2006 report was accepted for publication in March 2007 and published in 2008, under the title *From policy to practice, A systemic change to lifelong guidance in Europe*. [3] However, his name was not cited on the cover page. Instead, he was only mentioned as one of the contributors in the "Acknowledgement" section of the Report.

4. In January 2008, in reply to a query from the complainant, Cedefop explained that it had changed its citation policy in October 2007. As a result, the authorship of external reports was no longer recognised in Cedefop's publications.

5. On 10 February 2008, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

6. The complainant alleged that Cedefop's refusal to recognise him as the author of the 2006



report was inconsistent with the Centre's previous practice and was unfair.

7. The complainant claimed that Cedefop should recognise his authorship in the Acknowledgement Section of the Report in accordance with terms agreed with him.

THE INQUIRY

8. On 16 April 2008, the Ombudsman asked Cedefop to submit an opinion, which it did on 24 July 2008. The opinion was forwarded to the complainant for observations, which he sent on 16 October 2008.

9. On 10 February 2009, the Ombudsman's services contacted the complainant in order to discuss a proposal for a friendly solution.

10. On 26 March 2009, the Ombudsman made a friendly solution proposal to Cedefop.

11. On 7 May 2009, Cedefop indicated that it could not accept the Ombudsman's friendly solution.

12. On 9 June 2009, the complainant sent his observations to Cedefop's reply to the Ombudsman's friendly solution.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation that Cedefop acted unfairly and inconsistently

Arguments presented to the Ombudsman

13. The complainant alleged that Cedefop's refusal to recognise him as the author of the 2006 report was inconsistent with its previous practice and was unfair.

14. In support of his allegation, the complainant submitted the following arguments:

(a) Cedefop clearly acknowledged him as the author of the 2004 report by citing his name on the cover page of the 2004 report. However, it failed to do so as regards the 2006 report.

(b) The contract on the basis of which the 2004 report was commissioned to him was exactly the same as the contract concerning the 2006 report. For that reason, when agreeing on the contract to draft the 2006 report, he believed and expected Cedefop's citation policy for the 2006 report to be identical to that used for the 2004 report.

(c) The Cedefop new citation policy should not have been applied retroactively.



15. The complainant also argued that:

(a) in the pre-publication version of the 2006 report distributed to participants at a conference on " *Guidance for Workforce Development* " (Thessaloniki, 25-26 June 2007), Cedefop cited him as the author; and

(b) even after the new policy was introduced, Cedefop, in November 2007, attributed authorship to Mr W. for a publication by Mr W. in the same series of publications in which the complainant's report features.

16. In its opinion submitted to the Ombudsman, Cedefop admitted that the contracts concluded with the complainant concerning both the 2004 report and the 2006 report were identical. They did not include any rules on citation policy. However, Article II.8 of the contracts provided that: " *Any results or rights thereon, including copyright and other intellectual or industrial property rights obtained in performance of the Contract, shall be owned solely by Cedefop, which may use, publish, assign or transfer them as it sees fit, without geographical or other limitation, except where industrial or intellectual property rights exist prior to the Contract being entered into.* " This provision complied with the General Conditions of the Financial Regulation, which outline that an institution has ownership over the results of its service contracts and provide, in Article II.10, that an institution may " *decide on the use, distribution and publication of the results of the service contract, including the right to use parts of the results only, or not to publish any of the results, as it sees appropriate.* "

17. Until 2007, Cedefop had no clear citation policy regarding the papers drafted on the basis of the service contracts. Decisions in this respect were made on a case-by-case basis. In October 2007, Cedefop established its citation policy and rigorously adhered to it concerning all publications published from that date onwards.

18. As a result of this policy, authors of remunerated reports, commissioned by Cedefop on the basis of service contracts and normally subject to changes introduced by Cedefop experts, are no longer cited as authors in the final publications. However, they " *are acknowledged in the Acknowledgement Section in line with their specific contribution to the result achieved, including the clear reference to the respective service contract.* " In contrast, the authors who submit non-remunerated articles for Cedefop's publication entitled the *European Journal of Vocational Training* are recognised as authors.

19. In the complainant's case, Cedefop outlined that it did not apply its citation policy retroactively. In this respect, it noted that the complainant's report was published shortly after the adoption date of the new policy.

20. Cedefop also pointed out that informing potential external contractors, often represented by consortia, about this citation policy was not possible, given the number of service contracts it awarded. In any event, such contractors do not acquire the right to be cited as authors on Cedefop's publications.



21. As regards Mr W.'s publication, Cedefop stated that it concerned a non-remunerated contribution which was not connected to a service contract. Therefore, the citation policy did not apply to it.

22. Finally, Cedefop maintained that the complainant's draft version of the report used at the Conference in Thessaloniki in June 2007 did not yet constitute a "*Cedefop publication*". On the cover page, it was clearly marked "*Background document/final report, EN not revised*". This meant that the document was unedited and unrevised, since no additions or changes had yet been made by Cedefop's in-house experts.

23. In his observations, the complainant failed to see the link between remuneration for a study and authorship and maintained that Cedefop's experts did not contribute to the 2006 report. He maintained in substance his original allegation, arguments and claim.

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

24. First, it is indisputable that if a scientist produces a report to be published by Cedefop, the scientist would receive an added benefit if his/her name were cited on the publication's cover page.

25. Second, Cedefop may, within its margin of discretion, establish a new citation policy which changes its practice as regards citations. However, when doing so, Cedefop should not prejudice those authors who relied on the *old* practice when producing and submitting their studies. In this regard, the Ombudsman pointed to well-established case-law that the retroactive withdrawal of a legal measure, which has conferred individual rights or similar benefits on an individual, is contrary to the general principles of law [4] .

26. The Ombudsman considered that it was reasonable for the complainant to rely on the existing practice of Cedefop when, in March 2007, he submitted the 2006 report.

27. In light of the above, the Ombudsman considered that, by applying its *new* citation policy to the complainant's 2006 report, which was agreed, completed and accepted for publication before that *new* policy entered into force in October 2007, Cedefop (a) failed to act fairly and (b) did not respect the complainant's legitimate expectations based on Cedefop's *old* citation practice. Since this could be an instance of maladministration, the Ombudsman made the following friendly solution proposal, in accordance with Article 3(5) of the Statute of the European Ombudsman:

Cedefop could:

First, apologise to the complainant for having applied the new citation policy to the report agreed to and concluded before 1 October 2007; and

Second, recognise the complainant's authorship of the 2006 report in the same terms as it was



recognised in the 2004 report on "Guidance policies in the knowledge society: trends, challenges and responses across Europe" and insert a corrigendum in all versions of the study that are distributed in the future.

The arguments presented to the Ombudsman after his friendly solution proposal

28. Cedefop did not agree with the Ombudsman's friendly solution proposal. It argued that it had complied fully with the service contract, which formed the only legal basis for dealing with this matter. In this respect, it pointed out that the contracts concluded in 2004 and 2006 clearly did not give the complainant the right to have his name cited.

29. Cedefop also argued that the legal principle of legitimate expectations was not relevant in the present case, since no established long-lasting citation practice was in place before October 2007. Rather, decisions as regards citations were made on a case-by-case basis. In this context, a single occurrence does not constitute a "consistent practice". [5] In addition, no assurances whatsoever were given by Cedefop that the complainant would be cited as the author of the 2006 report.

30. According to Cedefop, the contracts explicitly and comprehensively assigned the intellectual property rights to Cedefop. The complainant was clearly aware of this. He was, therefore, not acting in good faith. Moreover, according to Cedefop, the complainant conceded in his complaints to Cedefop that, from a formal and legal point of view, a right to authorship did not exist. [6] As a result, the complainant could not possibly have legitimate expectations to derive a benefit which would in fact have been contrary to the clearly stated contractual provisions. The principle of legal certainty has been adhered to, as the legal rules were clear and precise. [7] Cedefop underlined, that there is also no case law that would support the view that an incorrect application of a provision in one single previous service contract would allow for legitimate expectations to arise. In fact the incorrect application of a contract can never confer individual rights.

31. Cedefop further argued that an external contractor who signs a service contract with the Centre does so in his capacity as a "service provider", and not in his capacity as "scientist". In sum, he provides services in line with very specific contractual provisions and is not providing a 'scientific paper'. The services to be rendered to Cedefop are spelled out in detail in the service contract, including the exact subject-matter, the focus of the research, and the length of the report to be delivered to Cedefop. The respective tendering specifications, which form part of the service contract, provide exact instructions on the scope and content of the report in question. In order to ensure full compliance with the tendering specifications by the external contractor, Cedefop staff oversee and monitor the tasks of the contractors step by step, giving guidance and instructions to the service providers/external contractors. What is more, the result of the service contract, that is, the report, may be published in a completely modified version, or in the original version. Cedefop may decide to re-write the report as it wishes, as it is Cedefop's intellectual property. Cedefop decides when and if to publish, and may well decide never to publish a report.



32. Cedefop stated that the cut-off date for the citation policy was October 2007. This was applied rigorously and without exception by Cedefop. In any case, a citation policy did not exist before October 2007, the complainant's assumptions to the contrary notwithstanding.

33. Cedefop stated that it is within its margin of discretion to establish a citation policy.

34. Cedefop further stated that the issue of citation is an internal matter of Cedefop. Because of its internal character, the Cedefop citation policy was not communicated to the complainant. The only relevant and legally binding document for external contractors consists of the service contract.

35. As regards the complainant's references to the contribution by Mr W., who was cited as an author, Cedefop stated that this contribution was not connected to any service contract concluded with Cedefop. Rather, it constituted Mr W.'s own independent work. Cedefop added that Mr W. may, of course, claim authorship for this work. In contrast external contractors, including the complainant, are subject to the provisions of the service contracts concluded with Cedefop. In other words, their contributions are the result of the precise instructions and indications stipulated in the service contract, including guidance, review and corrections by Cedefop staff. Thus, the contribution of Cedefop staff to such work is undisputed.

36. Cedefop drew the Ombudsman's attention to the fact that the complainant sent seven complaint letters to Cedefop. Cedefop replied extensively to each one, despite the fact that these letters were repetitive and contained numerous unfounded allegations and assertions.

37. Cedefop was surprised that the complainant did not seem to appreciate that his contribution was reflected appropriately in the acknowledgement section of the published report. It pointed out that the use of such acknowledgment is common practice in the European Union.

38. Given that the contractual provisions, which were clear and specific and which Cedefop followed to the letter, constituted the only relevant legal basis, Cedefop did not agree with the proposal for a friendly solution.

39. Cedefop regretted that the complainant had unfounded and unreasonable expectations. It also stated that the tone and content of his correspondence had raised serious doubts about the complainant's interest in reaching a friendly solution to this matter.

40. In conclusion, Cedefop asked the Ombudsman to reconsider his assessment and to conclude his inquiry with a finding of no maladministration.

41. In his observations, the complainant maintained his complaint and concluded that the Ombudsman has all the information at hand to make a decision.

The Ombudsman's assessment after his friendly solution proposal

42. The Ombudsman notes that Cedefop bases its arguments for its refusal to accept his



friendly solution proposal solely on the contractual rights and obligations of the complainant.

43. The Ombudsman notes that the contracts concluded with the complainant in 2004 and 2006 are identical. Neither contract gave the complainant a contractual right to have his name cited as the author of a publication. However, neither did the contracts *oblige* Cedefop not to cite the complainant as the author of a publication. Indeed, Cedefop took advantage of this contractual flexibility by first choosing to cite the complainant as the author of the 2004 report and later choosing to issue new citation rules in 2007 which stated that no reports paid for by Cedefop would cite the authors. Neither of the options chosen by Cedefop gave rise to a breach of contract by Cedefop (or by the complainant).

44. Since the decision of Cedefop to cite the complainant as the author of the 2004 report was not contrary to the 2004 service contract, the complainant was not wrong to believe that the 2006 report, which he submitted in accordance with an identical service contract, also allowed Cedefop to cite the complainant as the author of the 2006 report.

45. The Ombudsman considers that it was reasonable for the complainant to believe, in good faith, that Cedefop could, as it had done with the 2004 report, choose to cite him as author of the 2006 report. He recalls, in this respect, that the 2006 report was submitted by the complainant in March 2007, that is, seven months before Cedefop made known its new citation policy. It is the Ombudsman's view that Cedefop should not prejudice those authors who relied on the *old* practice when producing and submitting their studies.

46. While the Ombudsman considers that it was reasonable for the complainant to rely on the existing practice of Cedefop when, in March 2007, he submitted the 2006 report, the Ombudsman must underline that the policy in force prior to October 2007 did not require Cedefop to cite, *in every case*, the name of an author on the cover page of its publications. As Cedefop has indicated, prior to October 2007, decisions in relation to citing authors were made on a case-by-case basis. As such, it was, during that period, within Cedefop's margin of discretion to cite authors' names on the cover page on its publications, or to refrain from doing so. The Ombudsman has, however, consistently stated that a discretionary power is not the same as an arbitrary power. An administration which has a margin of discretion should always be in a position to justify, on the basis of objective criteria, why it chooses a particular option. As such, if Cedefop, prior to October 2007, made decisions on a case-by-case basis with respect to citing or not citing authors, it should have ensured that it would be in a position to justify, on the basis of objective criteria, those decisions. The importance of being in a position to justify such decisions on the basis of objective criteria is that the administration can thereby ensure that its decisions as regards citing authors would be neither discriminatory or disproportionate. Cedefop, however, has, in this case, put forward no objective reasons as to why it did not cite the complainant as the author of the 2006 report. [8] Rather, it (wrongly) relies only on the new citation policy and an erroneous interpretation of its contractual obligations to justify its position as regards the complainant. As noted above, i) the new citation policy should not be applied retroactively to reports which were submitted during the period in which the old citation policy was still in force and ii) the service contracts do not oblige Cedefop not to cite authors on the cover page of its publications.



47. The Ombudsman rejects Cedefop's assertion that the complainant was acting in bad faith when he contested the application of the 2007 citation rules to the 2006 report (see paragraph 30 above). Cedefop bases its assertion that the complainant acted in bad faith on the fact that the service contracts explicitly and comprehensively grant the intellectual property rights to Cedefop. It argues that, since the complainant was clearly aware of the terms of the contracts, he must not have been acting in good faith. The Ombudsman notes that the complainant was aware of the contractual provisions of the 2004 service contract when he submitted the 2004 report. That contract, which granted Cedefop the intellectual property rights in relation to the 2004 report, did not prevent Cedefop from *choosing* to cite the complainant as the author of that report. Cedefop took advantage of this contractual flexibility to cite the complainant as the author of the 2004 report. The 2006 service contract was identical to the 2004 service contract. As such, there was no reason why the complainant would not, in good faith, have understood that Cedefop could, and in fact would, also cite him as author to the 2006 report.

48. As regards Cedefop's "serious doubts" about the complainant's interest in a conciliatory resolution (see paragraph 39 above), the Ombudsman is of the view that, far from having doubts about the complainant's interest in adopting a conciliatory resolution, the Ombudsman notes that the complainant did, in fact, when informed of the Ombudsman's proposal for a friendly solution, express his agreement with the proposal for a friendly solution. The Ombudsman laments that these misunderstandings impede a friendly solution to the present case.

49. The Ombudsman is hopeful that the above analysis will help eliminate the misunderstandings that have arisen in the present case. In these circumstances, the Ombudsman considers it necessary to make draft recommendation to Cedefop, with a view to eliminating the instance of maladministration which has been identified in the present case.

C. The draft recommendation

On the basis of his inquiry into this complaint, the Ombudsman makes the following draft recommendation:

Cedefop should recognise the complainant's authorship of the 2006 report in the same terms as it was recognised in the 2004 report and should, therefore, insert a corrigendum in all versions of the study that are distributed in the future.

The complainant and Cedefop will be informed of my draft recommendation. In accordance with Article 3(6) of my Statute, Cedefop shall send a detailed opinion by 30 April 2010. The detailed opinion could consist of the acceptance of my draft recommendation and a description of how it has been implemented.



P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 5 January 2010

[1] *Guidance policies in the knowledge society: Trends, challenges and responses across Europe, A Cedefop Synthesis Report*, [the author], *Cedefop Panorama series*; 85, 2004 Luxembourg (non-disputed fact, see Cedefop's opinion p. 3).

[2] Service contract No 2006-0078/AO/B/JWA/-RLAR/CouncilRes/011/06.

[3] *From policy to practice, A systemic change to lifelong guidance in Europe* , Cedefop Panorama series; 149, 2008, Luxembourg.

[4] See, in this regard, Case 159/82, *Verli-Wallace v Commission* [1983] ECR 2711, paragraph 8; Case T-123/89, *Chomel v. Commission* [1990] ECR II-131, paragraph 34, Case T-197/99, *Gooch v. Commission* [2000] ECR-SC I-A-271 and II-1247, paragraph 53 and Case T-251/00, *Lagardère SCA and Canal+ SA v. Commission of the European Communities* [2002] ECR II-4825, paragraph 139 .

[5] Case T-20/91 *Holtbecker v Commission* [1992] ECR II-2599, paragraph 53.

[6] Case C-188/88 *NMB (Deutschland) GmbH v Commission* [1992] ECR I-1689, paragraph 53.

[7] Case C-107/97 *Rombi & Arkopharama* [2000] ECR I-3367, paragraph 66.

[8] In the absence of any objective reasons put forward by Cedefop, the Ombudsman takes the view that no such objective reasons exist. The Ombudsman notes that, in contrast, objective reasons were put forward by Cedefop in a similar case brought to the Ombudsman, namely case 1874/2008/BB.