

## **Decision of the European Ombudsman concerning complaint 760/2009/JMA against the European Commission**

Decision

**Case 760/2009/JMA - Opened on 27/04/2009 - Decision on 13/01/2010**

### **THE BACKGROUND TO THE COMPLAINT**

1. On 19 June 2008, the complainants took part in a number of tests held in Brussels and organised by a Dutch recruitment agency ('the agency') responsible for selecting suitable interim workers for the European Commission, in order to be considered for temporary work with that institution.
2. Soon after, the agency informed them that they had been successful in the tests and that, in order to be considered for any interim positions within the Commission, they had to periodically submit their CVs. As instructed, from June 2008 onwards, the complainants periodically sent to the agency updated versions of their CVs.
3. On 5 January 2009, the agency informed the complainants that, although they had both passed some of the tests, they had in fact failed their respective logic tests. Therefore, they could not be considered for an interim position within the Commission. The agency added that, in order to take this test again, they would have to wait one year.
4. The complainants contested the agency's new position. In reply, the agency informed them that the computer scores were infallible and that the only option at their disposal was to take the test again in the future.
5. On 7 January 2009, the complainants submitted a complaint to the Ombudsman, which was directed against both the agency and the European Commission. It was registered under reference 60/2009/JD. As regards the Commission, the complainants considered that this institution was ultimately responsible for the situation because the agency acted as its agent. Therefore, the institution should explain the agency's unprofessional behaviour and offer them suitable compensation for the loss suffered. The complainants also sent a copy of their complaint to the Ombudsman to both the Commission and the agency.



6. On the same day, the agency replied to both the Ombudsman and the complainants stating that, notwithstanding the allegations being made, it was clear from the computer scores that both complainants failed the logic test.

7. In a further e-mail dated 7 January 2009 and addressed to the Ombudsman, the complainants expressed their disagreement with the agency's arguments and requested financial compensation for the losses suffered.

8. After reviewing the situation, the Ombudsman found that the allegations made by the complainants against the agency did not meet the requirements set out in his Statute. The allegation against the agency did not involve actions from an EU institution or body, as required by Article 2(1) of the Statute. Furthermore, in relation to the allegation against the Commission, the Ombudsman considered that this aspect of the complaint had not been preceded by appropriate administrative approaches, as required by Article 2(4) of his Statute.

9. Accordingly, on 2 February 2009, the Ombudsman declared the case inadmissible. In his letter to the complainants closing the case, the Ombudsman advised them that, as regards their allegation against the Commission, they could consider writing to its responsible services (DG ADMIN). If they considered the Commission's reply to be unsatisfactory, they could then submit a new complaint to the Ombudsman.

10. Following the Ombudsman's suggestion, the complainants wrote to the Commission. In its reply of 13 March 2009, the Commission explained that it had contacted the agency, which, in view of the apparent misunderstanding resulting from its communication of the test results to the complainants, agreed to invite them to sit the test again. In its reply, the Commission underlined that it had informed the agency about its concerns concerning the fair and appropriate treatment that should be guaranteed for all potential candidates. The Commission hoped that the measures undertaken by the agency would be satisfactory and wished them all the success for the future.

11. The complainants considered the Commission's reply of 13 March 2009 to be unsatisfactory. On 22 March 2009, they submitted a new complaint to the Ombudsman. The complaint was registered under reference number 760/2009/JMA and forms the subject matter of the present inquiry.

## **THE COMPLAINT**

12. In the complaint, the Ombudsman identified the following allegation and claim:

The complainants allege that the Commission failed properly to supervise a private recruitment agency which organises tests on the Commission's behalf. In support of this allegation, they argued that the agency provided them with misleading information regarding the results of the tests they took on 19 June 2008 for interim work with the Commission. As a result, they suffered damages.



The complainants claim that the Commission should provide them with compensation for the expenses and losses suffered as a result of actions taken by the Commission's agent.

## THE INQUIRY

13. On 27 April 2009, the Ombudsman opened an inquiry and sent the complaint to the Commission with a request for an opinion. On 29 July 2009, the Commission sent its opinion, which was then forwarded to the complainants with an invitation to submit observations. On 27 September 2009, the complainants sent their observations on the Commission's opinion.

## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### A. The Commission's alleged failure properly to supervise a recruitment agency and the related claim

#### *Arguments presented to the Ombudsman*

14. The complainants considered that the Commission failed properly to reply to their arguments. They considered that the agency's offer to take the test again was not satisfactory since, in their view, after passing all the tests, they deserved to work for the Commission. They stated that the agency, which works for the Commission and examines candidates " *on behalf* " of the institution, did not succeed in demonstrating that the results of their logic tests were insufficient.

15. In its opinion, the Commission explained that, in order to have the possibility to hire temporary workers for short periods, it issued a call for tenders in this regard. As a result of the said tender, it entered into a contract for services with the agency in question and two other companies.

16. On the basis of the above contract, the temporary employment agencies provide the Commission with suitable candidates for interim positions within the institution. These candidates are not employed by the Commission, but rather by the temporary employment agency in question, which concludes a contract with them based on local law. The Commission underlined that, as recognised by the Community courts, no contractual or statutory link whatsoever is established between the temporary workers and the Commission.

17. Taking the above into account, the Commission considered that the complainants could not invoke any maladministration on its part. If any misunderstanding has arisen between the complainants and their possible future employer, namely, the agency, it should be dealt with by these two parties. The Commission pointed out that, according to Article II. 1.5 and II. 1.6 of the Commission's contract with the agency, the latter is obliged to inform staff sent to work in the



Commission that they do not belong to the European Civil Service and that the Commission is not their employer.

18. On 6 February 2009, the Commission was informed of the problems and misunderstandings between the complainants and the agency. Due to its concerns regarding the fair and equal treatment of all potential candidates, the Commission contacted the agency and requested it to review the complainants' situation. As a result of its initiative, the agency agreed to allow the complainants to take the tests again. By letter dated 13 March 2009, the Commission informed the complainants of the results of its actions towards the agency.

19. The Commission concluded by underlining that the Ombudsman should declare the complaint inadmissible, pursuant to Article 2 (1) of his Statute.

20. In their observations, the complainants repeated their allegations. They stressed that the initial information from the agency confirmed that they had passed the tests. In their view, the Commission bore responsibility for the situation, since the agency acted as the Commission's agent. They noted that it is not possible to join the Commission as an interim worker without having been recruited by a specialised recruitment agency. Such agencies must follow the procedures established by the Commission at all times. Moreover, the conditions of work are not determined by the recruiting agency, but by the Commission. Accordingly, the Commission should respond when the agency commits a wrongdoing.

#### *The Ombudsman's assessment*

21. At the outset, the Ombudsman notes that the rights and obligations of the different parties involved in interim-type work, namely, the Commission, the complainants and the agency involved, derive from two separate legal relationships. One is between the Commission and the agency, defined on the basis of a framework contract, and the second is between the agency and the complainants. In view of the allegations made by the complainants, the issue at stake in this case is whether the complainants, given their legal position, can enjoy any rights *vis-à-vis* the Commission.

22. The nature of this type of relationship has been reviewed by the then Court of First Instance which, in a relevant ruling [1], acknowledged that the relationship involving interim employees working for EU institutions appears to be three-fold. It involves three parties, namely, the temporary worker, the temporary employment business and the user. Their relationships are normally based on the conclusion of two contracts: one between the temporary work agency and the user, and a second between the temporary worker and the temporary employment business.

23. After assessing the relevant Community rules involving temporary employment relationships [2] and the applicable legislation of the Member State where these relationships took place, namely, Belgian legislation [3], the then Court of First Instance considered that the link between the temporary worker and the user constitutes a merely factual relationship. This is because only the temporary employment business has the right to exercise the authority vested on



employers over employees [4] .

24. The Court concluded, therefore, that an interim temporary worker who carries out his/her tasks for an EU institution has no direct legal relation with the latter, from which a legal right could be inferred. This is because the temporary worker has a contractual relationship only with the temporary employment business [5] .

25. Bearing the above judgment in mind, the Ombudsman has carefully reviewed the contract between the agency and the Commission. As set out in Article II.1.5, and contrary to what the complainants believe, the parties agreed that the agency could neither represent the Commission, nor behave in a way to give such an impression.

26. In light of the above, the supervisory powers of the Commission over the agency relate to the former's control over the agency's compliance with the contractual provisions. The contract indeed foresaw a number of conditions under which the Commission could terminate the contract. These include, for instance, the serious failure by the agency in professional matters, which was foreseen in Article II.15.1.c.

27. The parties agreed that the agency should ensure that the interim workers sent to the Commission following the latter's individual request in this respect ("*Persons prenant part à l'exécution du Contrat*") have qualifications and professional experience required for the relevant post (Article II.1.6).

28. The Ombudsman understands that this requirement should also apply to the agency's first selection of candidates for the establishment of a "*reserve list*" from which the interim workers could be chosen.

29. Even if the contract contains nothing about how this selection should be made, the nature and the purpose of the contract suggest that the Commission should require that, when making its selections, the agency in question respects basic principles of good administration, such as those of fairness and transparency.

30. Thus, the Ombudsman acknowledges and welcomes the contacts which the Commission took with the agency in order to ensure the fair treatment of candidates, and notes that these contacts led it to request that the situation of the complainants be reviewed.

31. The question remains unresolved, however, as to whether or not candidates themselves, as third parties to the contract, have the power to request the Commission directly to ensure that their selection by the agency is carried out in a fair and transparent way. Given that, in the contract between the Commission and the agency, the interim workers hired by the agency would not have any rights vis-à-vis the Commission [6] , the answer to this question must be negative. Nevertheless, the Ombudsman recalls that, according to Annex I of the contract concerning the conditions of the call for tenders, the contract has to respect the applicable Belgian legislation. It would, therefore, be for the Belgian courts to interpret the contract in case of a dispute between the parties.



32. In light of the above considerations, the Ombudsman considers that the complainants' allegation concerning specifically the Commission's failure to supervise the agency, and the relevant claim, cannot be sustained.

33. The Ombudsman is mindful of the fact, however, that the complainants, like all citizens, have the right to request and receive information that is as complete and precise as possible in reply to the queries they submit to the Commission. In this case, it appears reasonable for the complainants to expect that, following its contacts with the agency referred to above, the Commission would have informed them of the reasons why they were initially told that they had been placed in a reserve list, but were later informed that they had in fact failed the tests. This discrepancy raised a real concern for the complainants, which led them to question the fairness and transparency of the entire selection process.

34. The Ombudsman considers that, in its contacts with the agency, the Commission should have insisted on obtaining appropriate explanations, so as to enable it to relay them to the complainants. In view of the fact that its reply to the complainants dated 13 March 2009 did not provide such explanations, the Ombudsman will address a further remark to the Commission.

## C. Conclusion

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

There has been no maladministration by the Commission.

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

## Further Remark

The Commission could consider contacting the agency again to obtain appropriate explanations which will enable it to inform the complainants more clearly as to the reasons why the agency initially informed them that they had been successful, and subsequently, six months later, informed them that they had failed the tests.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 13 January 2010



[1] Case T-127/00 *Michael Nevin v Commission of the European Communities* [2002] ECR-SC I-A-149 and II-781, paragraphs 52-57.

[2] Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship; OJ 1991 L 206, pp. 19-21.

[3] Belgian Act of 24 July 1987.

[4] See above, Case T-127/00 *Nevin* , paragraph 57.

[5] See above, Case T-127/00 *Nevin* , paragraph 58.

[6] See Article II.1.6: " ... *ce dernier s'engage a n' invoquer a l'egard de la Commission aucun droit resultant de la relation contractuelle contre la Commission et le Contractant* "