

## **Draft recommendation to the European Commission in complaint 185/2005/ELB**

Recommendation

**Case 185/2005/ELB - Opened on 16/02/2005 - Recommendation on 31/03/2008 - Special report on 16/02/2005 - Decision on 04/12/2008**

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

### **Factual and Legal Background of the Complaint**

On the basis of Regulation 628/2000 (2) , the Commission and Parliament decided to stop recruiting auxiliary conference interpreters ("ACIs") over 65 years of age. Following this decision, certain interpreters initiated legal proceedings against the Commission and the European Parliament before the Court of First Instance (Joined Cases T-153/01 and T-323/01 (3) , Case T-275/01 (4) and Case T-276/01 (5) ). The complainant was not a party to these court proceedings.

In Cases T-323/01, 275/01 and 276/01, the applicants requested the annulment of the institutions' letters stating that they could no longer recruit ACIs over 65 years of age. The Court of First Instance found that, as a result of these letters, the institutions had refused to recruit the applicants because of their age, and that these decisions were not lawful. Further, the Court of First Instance held that the institutions had wrongly considered that Article 74(1) of the Conditions of Employment of Other Servants (6) applied to the applicants, essentially because the rules applicable to auxiliary session interpreters, established in a regulation adopted by the Bureau of the European Parliament on 13 July 1999, and in a convention signed on 28 July 1999, dealt with the issue of the end of the appointment and did not provide for an age limit for the recruitment of ACIs.

Parliament and the Commission then decided to change their policy, in order to comply with the terms of the judgments of the Court of First Instance.

The Commission, however, also lodged an appeal against the judgment of the Court of First Instance before the European Court of Justice (Case C-373/04 P (7) ). Parliament did not appeal the judgment of the Court of First Instance.



On 10 January 2006, the Court of Justice annulled the judgment of the Court of First Instance on procedural grounds, namely that the action for annulment before the Court of First Instance should have been declared inadmissible. The Court of Justice did not, however, rule on the substance of the case.

## **The Complaint**

According to the complaint, filed with the Ombudsman on 16 January 2005, the facts of the case are in summary as follows:

The complainant worked for the European institutions for more than 35 years as a freelance interpreter, translating into French from Dutch, English, German, Italian and Spanish. Since 1 May 2004, one month after the complainant reached the age of 65 years, he has not received any proposals for work from the Commission, although he fulfils all the eligibility criteria. On 27 June 2004, the complainant contacted the Commission to have his name added to the list of interpreters, from which he had been removed when he reached the age of 65 years. After a new e-mail from the complainant to the Commission on 28 September 2004, his access rights to a software programme that manages interpreters' availability (called Web Calendar) were re-established. On 7 January 2005, he informed the Commission of his intention to lodge a complaint with the European Ombudsman.

According to the complainant, the Commission refused to employ him because of his age. He still works for Europol, the Council of Europe and the Council of the European Union. The complainant argued that the Commission did not comply with Article 21 of the Charter of Fundamental Rights of the European Union (8) and Article 5(3) of the European Code of Good Administrative Behaviour (9) .

The complainant also lodged with the Ombudsman a complaint against the European Parliament. The complaint against Parliament was registered under a new reference (186/2005/ELB), and is being dealt with separately.

The complainant alleged that the Commission failed to comply with Article 21 of the Charter of Fundamental Rights and with the European Code of Good Administrative Behaviour.

The complainant claimed that the Commission should put an end to the discrimination to which he has been subjected since he reached the age of 65.

## **The Inquiry**

### **The Commission's opinion**

The opinion of the Commission can be summarised as follows:



The Commission recalled that, in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* (10), the Court of First Instance stated that, in view of the fact that interpreters were employed on a daily basis and that there was no obligation on the institutions to employ any individual for any particular period, the institutions could not impose an age limit for this particular type of contract. The Court of First Instance repeated that the institutions were under no legal obligation to employ a person, whatever his or her age and whatever the reasons for their decision, merely because that person had been employed on previous occasions. The Commission indicated that it had lodged an appeal against this judgment, but was aware of its obligation to comply with it pending the outcome of this appeal.

Since legal proceedings were ongoing, the Commission was of the opinion that, according to Article 1(3) of the Ombudsman's Statute, the complaint concerning the matter in question was not admissible. The Commission, nevertheless, replied to the complainant's allegations.

According to the Commission, ACIs were recruited, in the vast majority of cases, through an on-line electronic system, the key component of which was known as the "Web Calendar". This system allowed ACIs to indicate their availability to the Commission's Directorate-General ("DG") for Interpretation which, in turn, issued contract offers through the same system. Up to the date of the Court of First Instance's judgment in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*, access to this system had been restricted to ACIs under the age of 65. In order to comply with the terms of the judgment, all ACIs under the age of 65 at the time of the judgment were granted open-ended access to the Web Calendar. In addition, any ACIs over the age of 65 who so requested were allowed to have their access re-opened. The International Association of Conference Interpreters - the organisation which, jointly with the three recruiting institutions, signed the Agreement governing the working conditions and financial terms for ACIs - was informed of this change in procedure by DG Interpretation in a letter dated 8 October 2004.

In allowing access to its on-line contract system, the Commission considered that it had complied with Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* in the sense that it was not excluding any ACI from being eligible for employment on the grounds of their age. In addition, since the judgment, the Commission had, when the needs of the service so required, recruited individual interpreters over the age of 65 and would continue to do so pending the judgment on its appeal.

## The complainant's observations

In his observations, the complainant made, in summary, the following points:

The complainant stated that, on 10 June 2005, the Commission contacted him by telephone in order to offer him one day of work, whereas it had previously used the on-line system in order to contact him. This showed that a special procedure was being applied to him.



According to the complainant, in order to comply with the ruling of the Court of First Instance in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*, the Commission should offer contracts to interpreters over 65 years of age. During the four months before the Commission stopped recruiting the complainant, he had worked 23 days (that is, six days per month) for the Commission; afterwards he worked only one day per year for the Commission. In accordance with Article 18(1) and (2) of the European Code of Good Administrative Behaviour, the complainant would like to know why the Commission decided not to recruit him in 2005. The complainant argued that, since the proclamation of the Charter of Fundamental Rights by the Commission, the Council and Parliament, the Commission could no longer discriminate on the basis of age.

The complainant concluded by asking the Ombudsman to examine whether the Commission had complied with Articles 7, 18, and 19 of the Code of Good Administrative Behaviour (11) and to consider whether he should receive compensation in accordance with Article 41(3) (12) of the Charter of Fundamental Rights.

On 4 November 2005, the Ombudsman asked the complainant to specify his claim for compensation.

On 25 November 2005, the complainant replied to the Ombudsman's request. He considered that he worked, on average, 31 days per year for the Commission and, consequently, he claimed EUR 14 619 (EUR 10 932 corresponding to loss of earnings and EUR 3 687 corresponding to contributions to the "*Caisse de prévoyance des interprètes de conférence*"). He added that this amount is based on net figures after the deduction of the Community taxes. He considers that 45% (corresponding to the Community and Belgian taxes) should be added if the amount were to be paid before the applicable taxes were deducted. The complainant attached to his letter copies of certificates indicating the number of days that he had worked for the Commission.

On 13 December 2005, the complainant informed the Ombudsman that he had learnt that the Commission had set up a system of evaluation of freelance interpreters. The complainant had requested an interview with the Head of the French unit. His services were evaluated at level 2 (level 3 being excellent). He then received audition reports of his interpretation of various meetings, which show the high quality of his services. He therefore concluded that only his age can explain why he is no longer recruited by the Commission.

## Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman asked the Commission:

(1) to provide statistical data about the number of interpreters under and over 65 years of age who were offered interpreter contracts:

- before the Commission's decision, taken in 2000, to stop recruiting people over 65 years of



age,

- after the Commission's decision, taken in 2004, following the Court of First Instance's judgments (T-153/01 and T-323/01), to stop excluding ACIs over 65 years of age from job offers.

(2) to provide statistical data about the length of the contracts (number of working days) offered to interpreters under and over 65 years of age:

- before the Commission's decision, taken in 2000, to stop recruiting people over 65 years of age,
- after the Commission's decision, taken in 2004, following the Court of First Instance's judgments (T-153/01 and T-323/01), to stop excluding ACIs over 65 years of age from job offers.

(3) in case the data referred to in questions (1) and (2) show that, as from 2004, there was a decline in the percentage of persons over 65 years of age who were offered an interpreter contract and in the number of working days for which they were offered contracts, to provide adequate explanations for this disparity, based on specific data relating to objective factors unrelated to discrimination on grounds of age.

(4) to provide information as to whether the procedure to recruit interpreters over 65 years of age is the same as the one used for interpreters who are under 65 years of age and, if the procedure is different, to explain why. In this regard, the Commission was invited to comment on the complainant's argument that, on 10 June 2005, it contacted him by telephone in order to offer him one day of work, whereas it previously used the on-line system to make him job offers.

(5) to comment on the complainant's allegation that it did not comply with Article 19 of the European Code of Good Administrative Behaviour (concerning the indication of possibilities of appeals).

## The Commission's further opinion

The Commission's further opinion can be summarised as follows:

Reply to questions 1 and 2 *Recruitment over the age of 65*

The policy may be divided into three distinct periods:

- Prior to the entry into force of the Agreement on working conditions and financial terms for ACIs recruited by the institutions of the European Union on 1 September 1999, no formal age limit existed. Nevertheless, DG Interpretation's policy was to limit the recruitment of ACIs over 65 years of age to meet specific demands, such as the so-called "itinerant missions" or to respect interpretation commitments for certain languages. The aim of this policy is to maintain an adequate supply of work for newly-qualified young interpreters just coming onto the market and hence to ensure a supply of new entrants for the profession.
- With the entry into force of the Agreement, ACIs came within the scope of the Conditions of



Employment of Other Servants. The Commission considered that they were therefore subject to the statutory age limit and, consequently, recruitment of ACIs over 65 years of age was phased out. Furthermore, their access to the "Web Calendar" on-line recruiting system was withdrawn.

- The above interpretation was challenged in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* . The Court of First Instance concluded that the age limit did not apply to ACIs. Consequently, in order to comply with the Court of First Instance 's ruling, DG Interpretation restored access to the recruitment system (upon individual request) to ACIs over 65 years of age. ACIs who reached the age of 65 years after the judgment kept their access. Recruitment policy was the same as before 1 September 1999.

Consequently, the recruitment figures for individual ACIs are of limited relevance as the policy prior to 1999 was to recruit ACIs aged over 65 years only in specific circumstances. Between 1999 and the date of the Court of First Instance 's decision in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* , few ACIs aged over 65 years were recruited. After the judgment of the Court of First Instance, DG Interpretation reverted to its previous policy of recruitment on the basis of the needs of the service (13) .

The enclosed table details the number of ACIs over 65 years of age recruited per year, from 1987 until 2006. The table indicates the numbers of contract days for the ACIs over 65 years of age in absolute terms and as a percentage of the total contract days for each year.

#### **Year**

#### **Number of contracts (14)**

#### **Number of contract days (15)**

#### **Total number of freelance contract days**

#### **Percentage of total contract days by interpreters aged over 65**

1987

249

784

41 865

1.87

1988

205



559

41 141

1.36

1989

139

382

39 051

0.98

1990

163

530

39 804

1.33

1991

269

983

45 803

2.15

1992

343

1223

48 215

2.54

7



1993

280

873

47 583

1.83

1994

296

905

50 481

1.79

1995

316

1080

51 316

2.10

1996

384

1280

48 652

2.63

1997

576

8





1819

52 756

3.45

1998

853

2654

57 289

4.63

1999

799

2401

52 645

4.56

2000

552

1665

56 396

2.95

2001

2

8

68 253

0.01

9



2002

17

39

66 092

0.06

2003

24

69

64 260

0.11

2004

6

15

59 429

0.03

2005

141

387

58 798

0.66

2006

21

10



55

28 660

0.19

Total all years

17 711

1 018 489

1.74

#### *Recruitment policy background and facts*

ACIs are recruited according to the needs of the service, taking into account their language combination, professional domicile and general competence. It is important to underline that the policy of DG Interpretation is to ensure, as far as possible, recruitment opportunities for young interpreters. The demographic developments in the profession are worrying, and steps have been taken in order to maintain an adequate and qualified pool of freelance interpreters as a source of sustained recruitment in the longer term (as an example, the average age in the three largest language booths, namely, English, French and German, is around 50). Other arguments can be brought to corroborate this policy such as:

- the institutions' longstanding and diversified financial support for the training of young interpreters;
- the necessity for young colleagues to acquire enough experience and practice, so that they enter the next open competitions with a reasonable chance of passing them and, in so doing, to improve the age pyramid; for this purpose DG Interpretation created a newcomers' scheme, which guarantees young ACIs a certain number of consecutive recruitment days;
- the much greater likelihood that young interpreters will add new languages, which the Service needs, to their language combination.

#### Reply to question 3

There could not be any decline in the percentage of freelance interpreters over 65 years of age who were offered a contract as from 2004 due to the fact that they were not recruited before that date either.

#### Reply to question 4

ACIs are, in the vast majority of cases, recruited through an on-line system, the key component of which is known as the Web Calendar. This system permits them to indicate their availability to the recruitment unit in DG Interpretation which, in turn, issues contract offers through the same system. This system is applied to all freelance interpreters.



The complainant was indeed offered a contract by telephone on Friday, 10 June 2005 for Monday, 13 June 2005. It is normal practice to contact the ACI by telephone in urgent cases like this one, as there would not be enough time to go through the Web Calendar.

Reply to question 5

The European Code of Good Administrative Behaviour mentioned by the Ombudsman is not legally binding on the Commission. However, the Commission noted that it was bound by Article 3 of its Code of Good Administrative Behaviour which stipulates its duty to state arrangements for appeal where Community law so provides, in the case of notifications to interested parties or in the case of decisions. In the present case, however, no notification was sent or decision taken with regard to the complainant. The Commission believed that the above-mentioned article was not applicable.

In conclusion, the Commission stated that the demographic developments in the profession are worrying, and DG Interpretation would have to take the necessary measures to ensure that its recruitment policy works in favour of maintaining an adequate and qualified pool of freelance interpreters as a source of sustained recruitment in the longer term. However this does not exclude the recruitment of interpreters over the age of 65 according to the needs of the Service.

## The complainant's further observations

The complainant's further observations can be summarised as follows:

On 2 April 2006, the complainant informed the Ombudsman that he had been offered one day of work in 2006, which he had to decline because he had other commitments. He noted that this offer came just before the end of the deadline granted by the Ombudsman to the Commission to reply to his request.

Reply to questions 1 and 2

First, the complainant noted that, before 1999, he was not aware of the special needs referred to by the Commission. Moreover, he was never informed of a legal basis explaining a regulation, a practice or a policy recruitment applied by the Commission. Thus, he considered that interpreters over 65 years of age were being discriminated against.

As regards the second period (1999-2004), the Commission was wrong to consider that the Conditions of Employment of Other Servants applied to ACIs. The Court of First Instance had so stated in 2004. The Court of Justice, in its judgment C-373/04 P, did not contradict the Court of First Instance's judgment on this point. Consequently, during this period, there was no reason not to recruit interpreters over 65 years of age.

As regards the period after 2004, the Commission reverted to its policy of 1999, which,



according to the complainant, is discriminatory because interpreters over 65 years of age are less well treated than others.

Concerning the table, the complainant considered that it was in contradiction with the explanations given by the Commission. It shows that the number of contracts decreased as from 2001. Thus, from this date, the Commission considered that interpreters over 65 years of age could no longer be recruited. Moreover, the number of interpreters over 65 years of age varies from year to year. The profession is composed of young ACIs and some schools of interpretation only opened in the 1960s. It was only in 2005 that the first of the interpreters employed by the institutions reached the age of 65 years. The complainant noted that it would be interesting to know how many young interpreters obtain their diploma and pass the admission test at the Commission and Parliament, and what their combination of languages is. He considered that the data provided by the Commission were not very meaningful.

The complainant worked 59 days for the Commission in 2003; 23 in 2004 (during the first four months), 2 days in 2005 and 0 days in 2006. He repeated that this cannot be explained by his professional competence, as the Commission recognised that it was of a good level.

Reply to question 3

The complainant considered that the Commission did not answer this question.

Reply to question 4

The complainant indicated that it is not normal practice to contact interpreters by telephone even in urgent cases. The Commission normally uses the Quick Calendar.

Reply to question 5

The complainant admitted that he did not receive any decision informing him that he would no longer be recruited. He added that the institutions never took such a decision. That was one of the difficulties faced by the applicant in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*. He considered that the Commission was abusing Article 3 of the Commission's Code of Good Administrative Behaviour.

The complainant took the view that, in order to meet its needs, the Commission should recruit interpreters over 65 years of age. He indicated that the Commission did not mention its programme of integration of young interpreters, guaranteeing recruitment for 100 days at the basic salary provided they chose to live in Brussels. This programme was abandoned a year and half ago.

The complainant stated that he was affected by this discrimination despite his good and faithful service. He referred to his letter of 25 November 2005, in which he gave details about his claim for compensation. He assessed the moral prejudice at EUR 20 000.



## The Ombudsman's Efforts to Achieve a Friendly Solution

After careful consideration of the Commission's opinions and the complainant's observations, the Ombudsman did not consider that the Commission had responded adequately to all aspects of the complainant's allegation and claim. In accordance with Article 3(5) of the Statute of the European Ombudsman (16), he therefore wrote to the President of the Commission to propose a friendly solution on the basis of the following analysis of the issues in dispute between the complainant and the Commission:

1 The complainant alleged that the European Commission had failed to comply with the principle of non-discrimination on grounds of age, provided for in Article 21 of the Charter of Fundamental Rights of the European Union and in the European Code of Good Administrative Behaviour. The complainant claimed that the Commission should put an end to the discrimination to which he has been subjected since he reached the age of 65.

2 In its first opinion, the Commission explained that, in order to comply with the terms of the judgment in Cases T-153/01 and T-323/01, all ACIs under the age of 65 at the time of the judgment were granted open-ended access to the Web Calendar. In addition, any ACIs over the age of 65 who so requested were allowed to have their access re-opened. In allowing access to its on-line contract system, the Commission considered that it had complied with the above-mentioned judgment in the sense that it was not excluding any ACI from being eligible for employment on the grounds of age. In addition, since the judgment, the Commission has, when the needs of the service so require, recruited individual interpreters over the age of 65 and would continue to do so pending the judgment on its appeal.

3 In its reply to the Ombudsman's further inquiries letter of 13 December 2005, the Commission stated the following: Prior to the entry into force of the Agreement on working conditions and financial terms for ACIs recruited by the institutions of the European Union on 1 September 1999, no formal age limit existed. Nevertheless, the policy of the Directorate-General for Interpretation of the European Commission ("DG Interpretation") was to limit the recruitment of ACIs aged over 65 years to meet specific demands, such as the so-called "itinerant missions" or to respect interpretation commitments for certain languages, the aim of this policy being to maintain an adequate supply of work for newly-qualified young interpreters just coming onto the market and hence ensure a supply of new entrants for the profession. With the entry into force of the agreement, ACIs came within the scope of the Conditions of Employment of Other Servants. The Commission considered that they were therefore subject to the statutory age limit and therefore recruitment of ACIs over 65 years of age was phased out. Furthermore, their access to the "Web Calendar" on-line recruiting system was withdrawn. This interpretation was challenged in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*. The Court of First Instance concluded that the age limit did not apply to ACIs and, consequently, in order to comply with the Court of First Instance's ruling, DG Interpretation restored, upon individual request, access to the recruitment system to ACIs over 65 years of age. ACIs who reached the age of 65 years after the judgment kept their access to the Web Calendar. The recruitment



policy was the same as before 1999.

ACIs are, thus, recruited according to the needs of the Service, taking into account their language combination, professional domicile and general competence. The policy of DG Interpretation is to ensure, as far as possible, recruitment opportunities for young interpreters. The demographic developments in the profession are alarming, and steps have been taken in order to maintain an adequate and qualified pool of freelance interpreters as a source of sustained recruitment in the longer term (as an example the average age in the three largest language booths, namely, English, French and German, is around 50). Other arguments can be brought to corroborate this policy such as (i) the institutions' longstanding and diversified financial support for the training of young interpreters; (ii) the necessity for young colleagues to acquire enough experience and practice, so that they enter future open competitions with a reasonable chance of passing them and, in so doing, to improve the age pyramid; for this purpose DG Interpretation created a newcomers' scheme, which guarantees young ACIs a certain number of consecutive recruitment days; (iii) the much greater likelihood of young interpreters being in a position to add to their language combination of new languages, which the Service needs.

In accordance with the Ombudsman's request for such information, the Commission also provided statistical data indicating the number of contract days for the ACIs over 65 years of age in absolute terms and as a percentage of the total contract days for each of the years 1987-2006.

4 The Ombudsman, first, observed that the principle of non-discrimination on grounds of age, embodied in Article 21 of the Charter of Fundamental Rights, constitutes a general principle of Community law (17). Pursuant to this principle, when the Commission recruits ACIs, it may not treat candidates differently on the basis of their age, unless it shows that such treatment is adequately justified, as being suitably tailored to serve a legitimate and sufficiently important Community interest.

5 In the context of the Ombudsman's inquiry into the present complaint, the Commission clearly admitted that, when it offers ACI contracts, it disfavours and, thus, treats differently, interpreters over 65 years of age. As a result of this discriminatory policy and according to the statistical data provided by the Commission, the contract days of interpreters over 65 years of age represents 0.66% and 0.19% of the total number of contract days for ACIs in 2005 and 2006, respectively. Hence, the Commission had to show that this differential treatment is adequately justified, in the sense indicated above.

6 In this regard, the Commission has emphasised that demographic developments in the profession are alarming. It has put forward, in essence, that the different treatment is justified by its interest in ensuring recruitment opportunities for young interpreters and in training them, with a view to maintaining an adequate and qualified pool of freelance interpreters as a source of sustained recruitment in the longer term, and to improving the age pyramid of the interpreters-officials, by offering young interpreters the possibility to acquire enough experience and practice to enable them to succeed in future open competitions. The Ombudsman accepted



that the interest invoked by the Commission in creating and adequately training a new generation of competent interpreters for its needs is a legitimate Community interest. Nevertheless, the Commission's argument had not been substantiated, since the Commission had not provided any specific data and evidence in support of this argument. Moreover, the Commission had failed to establish the required balance between the challenged discrimination against interpreters over 65 years of age and the above interest. Indeed, this interest appears to be sufficiently important to justify a differential treatment in favour of the "young" interpreters, but its furtherance may equally be pursued by means that are considerably less burdensome on interpreters over 65 years of age. For example, one such means could be the balanced reduction of contract days given to all the other, "not young", candidates, independently of whether they are under or over 65 years of age.

7 In light of the above, the Ombudsman considered that the Commission had failed adequately to justify the challenged discrimination against interpreters over 65 years of age, such as the complainant. This discrimination may constitute an instance of maladministration. Therefore, the Ombudsman made a friendly solution proposal as regards this aspect of the case.

## The proposal for a friendly solution

In the light of his remarks in points 4 to 7 above, the Ombudsman suggested that the Commission could:

- consider abandoning its current policy of discriminating against interpreters over 65 years of age when it recruits ACIs;
- consider offering the complainant reasonable financial compensation for the application of the above policy in his case.

## The Commission's reply to the Ombudsman's proposal for a friendly solution

In reply to the Ombudsman's proposal, the Commission made the following points:

As regards recruitment of ACIs over 65 years of age

As already explained to the Ombudsman, the Commission adopted a policy aiming at ensuring the renewal of the profession of interpreters. On the one hand, it committed itself to promoting the training of young interpreters and, on the other hand, it guaranteed employment opportunities and training for these interpreters.

Moreover, since 26 March 2000, when Regulation 628/2000 entered into force, ACIs are governed by the Conditions of Employment of Other Servants. Consequently, the Commission announced that it would stop recruiting ACIs over 65 years of age in accordance with the Conditions of Employment. This position was challenged before the Court of First Instance, which in 2004 considered that it was unlawful (18) .





Thus, in order to comply with this judgment, the Commission changed its practice and announced that it would be recruiting ACIs, whatever their age, and in accordance with the needs of the services.

As it did not share the Court of First Instance's interpretation, the Commission launched an appeal against the Court of First Instance's judgment. This judgment was annulled by the Court of Justice in January 2006 (19). This judgment does not deal with the substance of the case.

Consequently, the Commission was of the view that its interpretation between 2000 and 2004 was correct and would be until it was annulled by a court judgment. It considered that there was no discrimination against the complainant. Hence, the Commission could not accept the Ombudsman's friendly solution proposal.

As regards the claim for compensation

The Commission's policy as regards interpretation is to recruit officials and ACIs. Recruiting ACIs gives the Commission the possibility to respond to the fluctuating workload at reasonable cost. The basic principle is the flexibility given to the Commission, which has no responsibility towards them.

The Commission referred to Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*, where the Court of First Instance concluded that

*" the Commission had no obligation to recruit [the applicant] again. An institution is free not to offer a new auxiliary agent contract to an interpreter whom it recruited before whatever her age and the reasons for this. "* (20)

In these circumstances, the Commission considered that there was no discrimination and no reason to offer compensation to the complainant.

## The complainant's observations on the Commission's reply

The complainant thanked the Ombudsman for the friendly solution proposal, which was of great comfort to him.

He pointed out that, a few days after having rejected the Ombudsman's proposal, the Commission issued an information note, dated 29 March 2007, on the recruitment of freelance interpreters over 65 years of age, where the following is stated:

*" Subsequent to the various cases brought before the Court and following internal discussions, the Commission has concluded that since 26 March 2000 (...) the ACIs have been within the scope of the Conditions of Employment of Other Servants of the European Community and that, in accordance with the provisions applying to other servants, their recruitment over the age of*



*65 is not possible (...) Consequently, the Commission intends to return to its initial position and no longer recruit ACIs aged over 65 ".*

He indicated that, as stated by the Ombudsman, *" I am not sure the citizen can easily reconcile the statements often made by the institutions that they want to get closer to the citizen when the Ombudsman's advice on how to improve relations is ignored ".*

He noted that the Commission maintained the position it had two years earlier. He also noted that the Commission did not adopt a new policy as regards training of young interpreters, as, according to him, this policy existed since the beginning.

The complainant referred to recital 25 of Directive 2000/78/EC (21) and considered that none of the exceptions mentioned could be invoked in order to justify the difference in treatment on the basis of age at the Commission.

In conclusion, the complainant maintained that the Commission had no reason to discriminate against him and recalled that he requested compensation for the moral prejudice for an amount of EUR 20 000. He did not understand the Commission's campaign on discrimination on the basis of age and its policy as regards interpreters over 65 years of age.

## **The Decision**

### **1 Alleged failure to comply with the Charter of Fundamental Rights as well as the European Code of Good Administrative Behaviour**

1.1 The complainant argued that, after he reached the age of 65, the Commission did not offer him an Auxiliary Conference Interpreter (" ACI") contract because of his age. He alleged that the Commission failed to comply with Article 21 of the Charter of Fundamental Rights and with the European Code of Good Administrative Behaviour. The complainant claimed that the Commission should put an end to the discrimination to which he has been subjected since he reached the age of 65 years.

1.2 In its first opinion, the Commission explained that, in order to comply with the terms of the judgment in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* , all ACIs under the age of 65 at the time of the judgment were granted open-ended access to the Web Calendar. In addition, any ACIs over the age of 65 who so requested were allowed to have their access re-opened. In allowing access to its on-line contract system, the Commission considered that it had complied with the above-mentioned judgment in the sense that it was not excluding any ACI from being eligible for employment on the grounds of their age. In addition, since the judgment, the Commission has, when the needs of the service so required, recruited individual interpreters over the age of 65 and would continue to do so pending the judgment on the appeal.



1.3 In its reply to the Ombudsman's further inquiries letter of 13 December 2005, the Commission stated the following: Prior to the entry into force of the Agreement on working conditions and financial terms for ACIs recruited by the institutions of the European Union on 1 September 1999, no formal age limit existed. Nevertheless, the policy of DG Interpretation was to limit the recruitment of ACIs aged over 65 years to meet specific demands, the aim of this policy being to maintain an adequate supply of work for newly-qualified young interpreters just coming onto the market and hence ensure a supply of new entrants for the profession. With the entry into force of the agreement, ACIs came within the scope of the Conditions of Employment of Other Servants. The Commission considered that they were therefore subject to the statutory age limit and therefore recruitment of ACIs over 65 years of age was phased out. Furthermore, their access to the "Web Calendar" on-line recruiting system was withdrawn. This interpretation was challenged in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission*. The Court of First Instance concluded that the age limit did not apply to ACIs and, consequently, in order to comply with the Court of First Instance's ruling, DG Interpretation restored, upon individual request, access to the recruitment system to ACIs over 65 years of age. ACIs who reached the age of 65 years after the judgment kept their access to the Web Calendar. The recruitment policy was the same as before 1999.

The Commission further explained that ACIs were, thus, recruited according to the needs of the Service, taking into account their language combination, professional domicile and general competence. The policy of DG Interpretation was to ensure, as far as possible, recruitment opportunities for young interpreters. The demographic developments in the profession are alarming, and steps have been taken in order to maintain an adequate and qualified pool of freelance interpreters as a source of sustained recruitment in the longer term. Other arguments can be brought to corroborate this policy such as (i) the institutions' longstanding and diversified financial support for the training of young interpreters; (ii) the necessity for young colleagues to acquire enough experience and practice, so that they enter future open competitions with a reasonable chance of passing them and, in so doing, to improve the age pyramid; for this purpose DG Interpretation created a newcomers' scheme, which guarantees young ACIs a certain number of consecutive recruitment days; (iii) the much greater likelihood of young interpreters being in a position to add to their language combination new languages, which the Service needs.

In accordance with the Ombudsman's request for such information, the Commission also provided statistical data indicating the number of contract days for the ACIs over 65 years of age in absolute terms and as a percentage of the total contract days for each of the years 1987-2006.

1.4 Therefore, the Ombudsman addressed a proposal for a friendly solution to the Commission. He noted that the Commission admitted that, when it offers ACIs contracts, it treats interpreters over 65 years of age differently. He also noted that the Commission justified this differential treatment by its interest in ensuring recruitment opportunities for young interpreters and in training them. However, he also noted that the Commission's arguments had not been substantiated, since it had not provided any specific data and evidence in support of this



argument and that the Commission had failed to establish the required balance between the challenged discrimination and the above interest. Therefore, he concluded that the Commission had failed adequately to justify the challenged discrimination against interpreters over 65 years of age. The proposal was as follows:

*" The Ombudsman suggested that the Commission could:*

*(1) consider abandoning its current policy of discriminating against interpreters over 65 years of age when it recruits ACIs; (2) consider offering the complainant reasonable financial compensation for the application of the above policy in his case. "*

1.5 In its reply to the friendly solution proposal, the Commission explained that, following Case C-373/04 P *Commission v Alvarez Moreno* (22) , the judgment of the Court of First Instance in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* was annulled. The Commission was thus of the view that its interpretation of the rules, whereby it did not offer work to ACIs over 65 years of age, was correct, and would continue to be correct until it was annulled by the judgment of a court. Hence, the Commission could not accept the Ombudsman's friendly solution proposal.

The Commission also stated that:

*" the Commission had no obligation to recruit [the applicant] again. An institution is free not to offer a new auxiliary agent contract to an interpreter whom it recruited before whatever her age and the reasons for this. " (23)*

The Commission also stated that it has adopted a policy aiming at ensuring the renewal of the profession of interpreters. On the one hand, it commits itself to promoting the training of young interpreters and, on the other hand, it guarantees employment opportunities and training for these interpreters.

1.6 In his observations on the Commission's reply, the complainant indicated that, a few days after having rejected the Ombudsman's proposal, the Commission issued an information note, dated 29 March 2007, on the recruitment of freelance interpreters over 65 years of age, where the following is stated: *" Consequently, the Commission intends to return to its initial position and no longer recruit ACIs aged over 65 [ years of age ] "*.

1.7 The Ombudsman notes that the Commission's rejection of his friendly solution proposal (which was that the Commission should stop discriminating against ACIs over 65 years of age) was based mainly on the Court of Justice's judgment in Case C-373/04 P. The Ombudsman recalls that the Commission lodged an appeal with the Court of Justice with respect to the judgment of the Court of First Instance in Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* .

1.8 The Ombudsman observes, however, that Court of Justice annulled the ruling of the Court of First Instance on the ground that the latter should have considered the application to be



inadmissible. The Court of Justice did not, however, rule on the substance of the case and did not therefore overrule the legal interpretation set out in the ruling of the Court of First Instance.

1.9 The Ombudsman recalls that the Court of First Instance held that Article 74 of the Conditions of Employment of Other Staff is not applicable to ACIs, essentially because the rules applicable to auxiliary session interpreters are established in a regulation adopted by the Bureau of the European Parliament on 13 July 1999 and in a convention signed on 28 July 1999, dealt with the issue of the end of the appointment, neither of which provide for an age limit for the recruitment of ACIs.

While the Commission is correct in stating that it is not bound by the annulled ruling of the Court of First Instance, the Commission has not explained why it should not, on the basis of the facts and the applicable legal provisions, arrive at a conclusion which is identical to the conclusion of the Court of First Instance.

1.10 The Ombudsman notes that, in its reply to the friendly solution proposal, the Commission again explained that its policy was designed to ensure the "renewal" of the profession of interpreters. It also stated that its policy as regards recruiting ACIs gives the Commission the possibility to respond to a fluctuating workload, without having responsibility towards ACIs. As the Court of First Instance confirmed in Cases T-153/01 and T-323/01, the Commission had no obligation to recruit again an ACI that it had previously recruited.

1.11 The Ombudsman recognises that the Commission does enjoy a wide margin of discretion when recruiting staff. In particular, it cannot be required to continue to contract with specific ACIs simply because it has contracted with them in the past. However, the Commission's wide margin of discretion cannot be exercised in such a way as to infringe the principle of non-discrimination, which requires that different situations must not be treated in the same way unless such treatment is objectively justified.

1.12 The Ombudsman recalls that, according to the European Court of Justice, the principle of non-discrimination on grounds of age, embodied in Article 21 of the Charter of Fundamental Rights, constitutes a general principle of Community law (24) . Pursuant to this principle, when the Commission recruits ACIs, it may not treat them differently on the basis of their age, unless it shows that such treatment is objectively justified (25) . The Ombudsman also notes that, as regards compulsory retirement age leading to automatic termination of employment contract, the European Court of Justice has also stated that " *[t]he legitimacy of (...) an aim of public interest [the interests of promoting employment] cannot reasonably be called into question (...). Furthermore, the (...) encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy (...) Therefore, (such) an objective (...) must, in principle, be regarded as objectively and reasonably justifying (...) a difference in treatment on grounds of age (...). It remains to be determined whether (...) the means employed to achieve such a legitimate aim are appropriate and necessary* " (26) .

1.13 The Ombudsman notes that the interest invoked by the Commission in its opinion to the Ombudsman - the need to create recruitment opportunities for newcomers and to train them -



would appear to be a legitimate aim. However, the Ombudsman is not convinced that the means employed by the Commission - that is, a *complete ban* on the recruitment of ACIs over 65 - are "*appropriate and necessary*" to achieve that legitimate aim. In order to constitute an "*appropriate and necessary*" means to achieve that aim, the Commission would at least have to substantiate, with specific data and evidence, that it would be necessary to reserve specific translation work for newcomers. Such specific data and evidence should relate, for example, to the number of hours necessary in order to make a "newcomers' scheme" viable. Further, the Commission would have to demonstrate that the same aim could not be achieved by less restrictive means, such as means which would impact on trained interpreters of all ages, rather than on trained interpreters over 65 only.

Hence, the Ombudsman maintains that the Commission has failed adequately to justify the imposition of a ban on recruiting interpreters over 65 years of age. This constitutes an instance of maladministration. As a result, the Ombudsman will make a draft recommendation.

The Ombudsman would also like to draw the Commission's attention to Parliament's position in a similar complaint from the same complainant. The Ombudsman's draft recommendation in relation to the complaint against Parliament (see Case 186/2005/ELB) will be forwarded to the Commission for information.

## 2 Claim

2.1 The complainant claimed compensation in accordance with Article 41(3) for an amount of EUR 14 619 and assessed the moral prejudice at EUR 20 000.

2.2 The Ombudsman recalls that if an inquiry leads to a finding of maladministration, the Ombudsman may consider it appropriate for the institution concerned to offer financial compensation to a complainant that has suffered injury as a result of that maladministration.

The Ombudsman notes that the complainant claims compensation for a total amount of EUR 34 619.

The Ombudsman notes that the Commission has not provided any evidence to dispute the fact that the complainant continued to offer services of a high quality (see points 1.2, 1.3 and 1.5 above). However, it cannot, on this basis alone, be presumed that the complainant would have been offered the same amount of work which he had been previously offered. The Ombudsman considers that the precise losses incurred by the complainant will be dependent on numerous factors, which may, *inter alia*, include: to what extent the specific languages profile of the complainant matched the specific needs of the service during the relevant period, the volume of interpretation work contracted out to ACIs with the same language profile as the complainant during the relevant period, the number of candidates for work which corresponded to the complainant's language profile during the relevant period and the relative quality of such candidates.



## 3 Conclusion

3.1 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 Ombudsman recognises that the Commission enjoys a wide margin of discretion when recruiting its staff. In particular, it cannot be required to continue to contract with specific ACIs simply because it has contracted with them in the past. However, the Commission's discretion cannot infringe the principle of non-discrimination, which requires that different situations must not be treated in the same way unless such treatment is objectively justified.

Hence, the Ombudsman maintains that the Commission has failed adequately to justify the challenged discrimination against interpreters over 65 years of age. This constitutes an instance of maladministration. The Commission should consider changing its current policy of imposing a ban on recruitment of interpreters over 65 years of age. The Ombudsman considers it appropriate for the Commission to contact the complainant to agree on suitable compensation for losses incurred by the complainant due to the application of a discriminatory policy by the Commission.

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 by 30 June 2008.

Strasbourg, 31 March 2008

P. Nikiforos DIAMANDOUROS

(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, p. 15.

(2) Article 1 of Council Regulation No 628/2000 of 20 March 2000, amending Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities (OJ 2000 L 76, p. 1), states the following: " (...) (2) *All conference interpreters should consequently be engaged as auxiliary staff covered by Title III of the Conditions of Employment of Other Servants of the European Communities (...)*

*The following paragraph shall be added to Article 78 of the Conditions of Employment of Other*





*Servants of the European Communities:*

*The same conditions of recruitment and remuneration applied to conference interpreters engaged by the European Parliament shall apply to auxiliary staff engaged by the Commission as conference interpreters on behalf of the Community institutions and bodies ".*

(3) Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* [2004] ECR-SC I-A-161 and II-719.

(4) Case T-275/01 *Alvarez Moreno v Parliament* [2004] ECR-SC I-A-171 and II-765.

(5) Case T-276/01 *Garroni v Parliament* [2004] ECR-SC I-A-177 and II-795.

(6) Article 74 (1) of the Conditions of Employment of Other Servants, which expired on 30 April 2004, states that " *Apart from cessation on death, the employment of auxiliary staff shall cease:*

*1. where the contract is for a fixed period:*

*(a) on the date stated in the contract;*

*(b) at the end of the month in which the servant reaches the age of 65 years; "*

(7) Case C-373/04 P *Commission v Alvarez Moreno* [2006] ECR I-1.

(8) Article 21 of the Charter of Fundamental Rights states that: " *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited "*.

(9) Article 5(3) of the European Code of Good Administrative Behaviour states the following: " *The official shall in particular avoid any unjustified discrimination between members of the public based on nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation. "*

(10) Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* [2004] ECR-SC I-A-161 and II-719.

(11) According to Article 7 of the European Code of Good Administrative Behaviour, " *Powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest. "*

Article 18 states that " *1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the*





*relevant facts and the legal basis of the decision. 2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning. 3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning. "*

Article 19 states that: " A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them. 2. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 230 and 195 of the Treaty establishing the European Community. "

(12) Article 41(3) of the Charter of Fundamental Rights states that: " Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. "

(13) It is worth noting that, in the meantime, the Court has issued a judgment accepting an appeal lodged by the Commission against the initial ruling (Case C-373/04 P *Commission v Alvarez Moreno* [2006] ECR I-1).

(14) The figures include recruitment up to the end of the month of the ACIs' 65th birthday.

(15) The figures include recruitment up to the end of the month of the ACIs' 65th birthday.

(16) " As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint. "

(17) See Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75.

(18) Joined Cases T-153/01 and T-323/01 *Alvarez Moreno v Commission* [2004] ECR-SC I-A-161 and II-719.

(19) Case C-373/04 *Commission v Alvarez Moreno* [2006] ECR I-1.

(20) Paragraph 105.

(21) Directive 2000/78/EC, OJ 2000 L 303, p. 16

" The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore



*require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited. "*

(22) Case C-373/04 P *Commission v Alvarez Moreno* [2006] ECR I-1.

(23) Paragraph 105 states the following in French: "*la Commission n'avait, en tout été de cause, pas l'obligation de faire appel à nouveau à ses services. Il demeure en effet toujours loisible à l'administration de ne pas conclure de nouveau contrat d'agent auxiliaire avec un interprète auquel elle avait précédemment fait appel, et cela quels que soient l'âge de ce dernier et les motifs qui la conduisent à cette décision. "*

(24) See Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75.

(25) Case C-344/04 *International Air Transport and others* [2006] ECR I-403, paragraph 95.

(26) Case C-411/05 *Palacios de la Villa* , judgment of 16 October 2007, not yet published in the ECR, paragraphs 64-67.