

## **Decision of the European Ombudsman closing her inquiry into complaint 1228/2011/MMN against the European Food Safety Authority**

Decision

**Case** 1228/2011/MMN - **Opened on** 12/07/2011 - **Decision on** 12/12/2013 - **Institution concerned** European Food Safety Authority ( Critical remark ) |

### **The background to the complaint**

1. The present case concerns the recovery of an allowance granted by the European Food Safety Authority ('EFSA') to a member of staff.
2. On 17 November 2008, the complainant in the present case was offered a position as a contract agent at EFSA in Parma.
3. Immediately prior to taking up her duties in Parma, the complainant was residing in the United States.
4. In an e-mail of 24 November 2008, EFSA indicated to the complainant that, in case she wished to obtain further information concerning several issues, including the installation allowance, she could contact an EFSA staff member.
5. On 25 November 2008, the complainant submitted various questions relating to taking up of her duties and asked to receive more information on the granting of the installation allowance.
6. On 28 November 2008, EFSA informed the complainant that, in order to receive the installation allowance, she would need to provide a rental contract for a period of at least 6 months and fill in a form that she would be given after taking up her duties.
7. The complainant started her employment as a contract agent on 1 February 2009, with a probationary period of 9 months (until 31 October 2009).
8. On 6 April 2009, the complainant informed EFSA that she had found an apartment and wished to know how she could claim the installation allowance.



9. On the same date, EFSA replied by providing her with a form that she had to fill in. The complainant subsequently claimed and obtained the installation allowance.
10. On 30 October 2009, the complainant's probationary period was extended for an additional period of 6 months (until 30 April 2010).
11. On 26 March 2010, on the basis of a negative probationary report, EFSA decided not to confirm the complainant's contract after the expiry of her probationary period.
12. In an e-mail of 31 March 2010, and in subsequent e-mails, EFSA informed the complainant that it might have to recover the installation allowance, at least in part.
13. On 5 July 2010, EFSA informed the complainant that it intended to recover the installation allowance in full.
14. On 29 September 2010, the complainant lodged a complaint with EFSA against the recovery decision. She did so pursuant to Article 90(2) of the Staff Regulations of officials of the European Union (the 'Staff Regulations'). In particular, she argued that the conditions for recovery set out in Article 85 of the Staff Regulations were not fulfilled. Article 85 of the Staff Regulations provides that "*[a]ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.*" The complainant argued that she was not aware of the irregularity of the payment of the installation allowance and that the irregularity was not so obvious that she could not have ignored it.
15. On 21 January 2011, EFSA rejected the complainant's appeal. It argued that, according to Articles 24 and 92 of the Conditions of Employment of Other Servants of the EU, contract agents will receive an installation allowance as provided for in Article 5 of Annex VII to the Staff Regulations. According to this latter provision, the installation allowance will be paid to an 'established official'. Thus, EFSA concluded that the right to obtain the installation allowance is only acquired when the probationary period is successfully passed.
16. As regards Article 85 of the Staff Regulations, EFSA argued that, according to the jurisprudence, a diligent contract agent is required to know the rules governing his or her own status. EFSA added that Article 5 of Annex VII to the Staff Regulations explicitly makes the installation allowance conditional upon the establishment of the official or agent. In EFSA's view, the complainant could not have been unaware of this.
17. On 6 June 2011, the complainant lodged the present complaint with the Ombudsman.

## **The subject matter of the inquiry**

18. In her complaint, the complainant submitted the following allegation and the following claim, which were included on the Ombudsman's inquiry:



## **Allegation:**

EFSA wrongly recovered the complainant's installation allowance.

## **Claim:**

EFSA should annul its recovery decision concerning the complainant's installation allowance.

## **The inquiry**

- 19.** On 7 July 2011, the Ombudsman requested the complainant to provide certain clarifications, as well as certain documents, which she did on 13 July 2011.
- 20.** On 17 October 2011, the Ombudsman invited EFSA to provide an opinion on the above allegation and claim.
- 21.** On 31 January 2012, EFSA provided its opinion, which was forwarded to the complainant for her observations.
- 22.** On 8 March 2012, the complainant submitted her observations.
- 23.** On 26 August 2013, the Ombudsman made a proposal for a friendly solution.
- 24.** On 27 September 2013, EFSA provided its reply to the friendly solution proposal, which was submitted to the complainant for her observations.
- 25.** On 16 October 2013, the complainant submitted her observations.

## **The Ombudsman's assessment and conclusions**

### **A. The allegation that EFSA wrongly recovered the installation allowance and related claim**

#### **Arguments presented to the Ombudsman**

- 26.** In its opinion, EFSA stressed that, according to Articles 24 and 92 of the Conditions of Employment of Other Servants of the EU, contract agents will receive an installation allowance as provided for in Article 5 of Annex VII to the Staff Regulations. According to this latter



provision, the installation allowance will be paid to an 'established official'. Thus, the right to obtain the installation allowance is only acquired once the probationary period is successfully completed.

**27.** EFSA further indicated that the complainant was aware of the fact that the allowance was paid as an advance. In particular, EFSA argued that the complainant participated in an induction session on her first day. During this session, a package of forms and documents was provided to all newcomers, including the complainant. EFSA noted that the installation allowance form was among the documents provided and explicitly stated that: "*For the purposes of Article 5 Annex VII to the Staff Regulations, or Article 24 of the Conditions of Employment of Other Servants, I, the undersigned ( by way of advance to officials, temporary and contract agents who are not yet established )/[...]*". (emphasis added)

**28.** Moreover, EFSA contended that, during the usual bilateral meetings held between staff of the human resources team and new recruits (such as the complainant), the fact that the installation allowance is considered an advance payment is always highlighted to newcomers. However, EFSA does not keep minutes of such meetings.

**29.** EFSA provided a copy of an acknowledgment of receipt of the Staff Regulations signed by the complainant, which contain the applicable rules.

**30.** The Authority added that its intranet contains explanations on individual rights and provides links to the relevant pages of the European Commission's intranet. The information contained therein explicitly refers to "*established officials and temporary/contract staff*" in relation to the installation allowance.

**31.** Furthermore, EFSA emphasised that the General Court has ruled that an agent of an average diligence is required to know the rules applicable to his or her status. [1] In addition, even if EFSA had made a promise about the alleged definitive nature of the payment ( *quod non* ), the Ombudsman has acknowledged that promises which are contrary to the applicable rules cannot give rise to legitimate expectations. [2]

**32.** Finally, EFSA indicated that, as a general rule for all recruitments made since 2012, the Authority pays the installation allowance only at the end of the probationary period. Only upon request from the staff member concerned, EFSA will consider making an advance payment prior to the end of the probationary period.

**33.** In her observations, the complainant insisted that, although EFSA's '*Newcomer's Road Book*' indicated that a separate document containing details on, *inter alia*, the installation allowance would be provided soon, she never received such a document. In the complainant's view, the documents enclosed with EFSA's opinion (including the above-mentioned installation allowance form) do not provide the details promised. Moreover, the complainant indicated that she could not confirm whether she had received the installation allowance form in question because she has no copy of it.



34. As regards her meeting with staff from the human resources department, the complainant indicated that she received considerable information and documents in a short period, which were difficult to analyse and assimilate. However, the complainant noted that the fact that the installation allowance was an advance payment was not made clear to her during that meeting.

35. As far as the information provided on EFSA's and the Commission's intranet is concerned, the complainant contended that it is not explicitly indicated therein that the installation allowance should be regarded as an advance payment pending the successful completion of the probationary period.

36. Finally, the complainant argued that, in view of the circumstances of the case, the payment of the installation allowance was not such that she could not have been unaware of the fact that it was an advance (Article 85 of the Staff Regulations). Therefore, in her view, EFSA was not entitled to claim its recovery.

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

37. According to Article 5(1) of Annex VII to the Staff Regulations, [3] "*an installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance, and equal to one month's basic salary in other cases shall be paid to an established official who furnishes evidence that a change in the place of residence was required in order to satisfy the requirements of Article 20 of the Staff Regulations*". It follows that the right to obtain the installation allowance is only acquired when the probationary period is successfully completed.

38. The complainant did not dispute that her probationary period was unsuccessful and that, as a result, she never became an 'established official' within the meaning of the above-mentioned provision. However, she considered that the conditions for the recovery of the installation allowance established by Article 85 of the Staff Regulations were not fulfilled in her case.

39. In that regard, the complainant argued that she was not aware of the fact that the installation allowance was granted as an advance payment subject to her successfully completing her probationary period, since EFSA failed explicitly to inform her about this. Therefore, in her view, the conditions established in Article 85 of the Staff Regulations for the recovery of the allowance in question were not fulfilled.

40. The Ombudsman noted that, as laid down by the relevant jurisprudence, a diligent agent is expected to know the rules governing his or her own status. [4] Seen from this angle, EFSA's position is therefore fully understandable.

41. The Ombudsman considered, however, that the following elements needed to be taken into account in the present case.



**42.** Article 5 of Annex VII used the term 'established'. The meaning of this term was not clarified in that provision. Instead, one had to turn to Article 34(1) of the Staff Regulations, which provides that "*[o]fficials shall serve a nine-month probationary period before they can be established*". However, the rules governing contract agents were laid down in the Conditions of employment of other agents (the 'CEOS'). Article 84 of the CEOS provided that a member of the contract staff whose contract is concluded for a duration of at least one year 'shall' serve a probationary period. However, the rules governing contract agents did not refer, directly or indirectly, to Article 34 of the Staff Regulations.

**43.** Article 92 of the CEOS, which formed part of the rules on contract agents, stated that (among other provisions) Article 24 of the CEOS shall apply by analogy. Article 24 of the CEOS set out the rules governing the entitlement to the installation allowance for temporary agents. It referred to the installation allowance 'as provided in Article 5 of Annex VII to the Staff Regulations'. It should however be noted that Article 14 of the CEOS provided that temporary agents 'may' be required to serve a probationary period. It was thus perfectly possible for such an agent not to be asked to serve a probationary period. Given that Article 92 of the CEOS, which concerns contract agents, refers to the rules on temporary agents in this respect, the Ombudsman considered it possible that the conditions governing the grant of the installation allowance to contract agents may not have been evident to the complainant.

**44.** It was therefore clearly important to inform the complainant of the relevant rules. The complainant did not dispute EFSA's argument that she received a copy of the Staff Regulations. The Ombudsman presumed that this meant that the complainant also received a copy of the CEOS. However, in view of the above description of the legal situation, the Ombudsman took the view that EFSA needed to do more than merely handing over a copy of the relevant rules.

**45.** EFSA submitted that the complainant was informed about the relevant conditions on the occasion of an induction session on the first day of her work and on the occasion of the usual bilateral meetings between its human resources team and new recruits. However, the Ombudsman noted that EFSA accepted that there was no written evidence to confirm that the complainant was sufficiently informed about the rules governing the grant of the installation allowance to a contract agent. The fact that, on 6 April 2009, that is, two months after taking up her duties at EFSA, the complainant asked the latter for information about the installation allowance would seem to suggest that she had not by then received all the information that she needed.

**46.** In its opinion, EFSA submitted that it clearly informed the complainant that the payment of the installation allowance should be regarded as an advance payment. In this context, it referred to the wording of the form that the complainant had to fill in to claim the installation allowance. That form indeed explicitly stated that the payment should be regarded as an 'advance' (see point 27 above). There was however no evidence to show that this was the form that was made available to the complainant at the relevant time. In fact, the version of the form that was signed by the complainant (a copy of which was enclosed with EFSA's opinion) did not explicitly state that the payment should be regarded as an 'advance'.



47. The Ombudsman further observed that the complainant submitted that EFSA's 'Newcomer's Road Book' indicated that a separate document with details, *inter alia*, on the installation allowance would be provided soon but that she never received such document.

48. The Ombudsman noted that EFSA has indicated that it had in the meantime amended its practice in this respect. As a general rule applying to all recruitments made since 2012, EFSA pays the installation allowance only at the end of the probationary period. Only upon request from the staff member concerned, EFSA would consider making an advance payment prior to the end of the probationary period. The Ombudsman commended EFSA for this change in its administrative practice, which would avoid similar problems from arising in the future.

49. As regards the present case, however, the Ombudsman considered that it would be good administrative practice for EFSA to make a gesture of good will in order to acknowledge the fact that the complainant did not appear to have been as well informed about the relevant rules as she could and should have been. EFSA could thus consider making an adequate *ex gratia* payment to the complainant in order to try and offset the negative consequences resulting from the uncertainties surrounding the present case. The *ex gratia* payment could correspond to an appropriate percentage of the installation allowance, which would be for EFSA to determine. Making such a payment would show, without establishing any precedent, that the institution cares for members of its staff, both present and past.

50. The Ombudsman therefore made the following proposal for a friendly solution:

**Taking into account the Ombudsman's findings, EFSA could consider making an *ex gratia* payment corresponding to an appropriate percentage of the installation allowance to the complainant.**

## **The arguments presented to the Ombudsman after her friendly solution proposal**

51. In its reply, EFSA indicated that it did not intend to accept the Ombudsman's proposal for a friendly solution for the following reasons.

52. As regards the rules governing the granting of the installation allowance to contract agents, EFSA insisted that their wording was sufficiently clear, leaving no scope for ambiguities and negative consequences for a diligent agent.

53. In particular, EFSA argued that Article 92 of the CEOS makes it clear that Article 24 of the Staff Regulations is applicable to contract agents. The latter provision refers in turns to Article 5 of Annex VII to the Staff Regulations, according to which "*[a]n installation allowance [...] shall be paid to an established official*".

54. Therefore, in EFSA's view, the above rules made it clear that only established officials and, by analogy, contract agents having successfully passed their probationary period, are entitled to





the installation allowance.

**55.** EFSA further noted that, despite the clarity of the applicable legal framework, EFSA on several occasions provided detailed information to the complainant concerning her entitlements, including the conditions under which she would have a right to the installation allowance. Furthermore, EFSA insisted that, according to the case-law, a diligent agent is expected to know the rules governing his or her own status. Moreover, although EFSA pointed out that it did not make any promise in this respect, the case-law has also established that promises that are contrary to the applicable rules cannot give rise to legitimate expectations. [5]

**56.** Considering that the complainant should have been aware of the fact that the payment she had received as regards the installation allowance was only an advance, EFSA took the view that the conditions to apply Article 85 of the Staff Regulations were met and that the recovery of the allowance was inevitable. Any other decision would be contrary to the principles of sound financial management and equal treatment in the application of the Staff Regulations.

**57.** In view of the foregoing, EFSA confirmed that it did not intend to set aside the recovery order in question.

**58.** In her observations, the complainant expressed her dissatisfaction with EFSA's reply.

**59.** She indicated that, in her view, the applicable rules were complex and subject to various interpretations. Although she admitted that she knew that she was required to pass a probationary period of 9 months, she insisted that she was not informed of the advance nature of the payment she had received. However, she admitted that EFSA did not make any promises regarding the installation allowance.

**60.** The complainant also noted that the fact that EFSA subsequently changed its practice suggests that the previous practice was not in line with the principles of good administration.

## **The Ombudsman's assessment after her friendly solution proposal**

**61.** As the Ombudsman noted at the time of the friendly solution proposal, a diligent agent is expected to know the rules governing his or her own status (point 40 above). From this perspective, EFSA's position is understandable since the complainant did not successfully complete her probationary period and thus did not become an established official entitled to the installation allowance.

**62.** However, the Ombudsman also noted that it was possible that the rules governing the granting of the installation allowance to contract agents may not have been evident to the complainant. In this regard, the Ombudsman pointed out that there was no written evidence that the complainant had been sufficiently informed of the relevant rules governing the installation allowance. In particular, there was no evidence that the form in which the complainant had





requested that allowance had made it clear that the payment should be regarded as an advance. The Ombudsman further referred to the complainant's argument that EFSA's 'Newcomer's Road Book' had announced that a separate document with details, *inter alia*, on the installation allowance would be provided soon but that she never received such document.

**63.** In view of the foregoing, the Ombudsman invited EFSA to consider making an *ex gratia* payment, without establishing any precedent. When doing so, the Ombudsman made it clear that what was suggested was not for EFSA to pay the complainant the entire amount of the installation allowance. Instead, the Ombudsman stressed that the *ex gratia* payment that was proposed could correspond to an appropriate percentage of the installation allowance, which would be for EFSA to determine.

**64.** In its reply, EFSA rejected the Ombudsman's proposal for a friendly solution. In essence, its position is based on the following reasons: first, the applicable rules were sufficiently clear and the complainant could be expected to know them; second, the complainant had been sufficiently informed; and, third, EFSA had to maintain recovery of the installation allowance in order to comply with the principles of sound financial management and equal treatment.

**65.** The Ombudsman is not convinced by EFSA's conclusions. Although it is true that a diligent agent can be expected to know the rules governing his or her own status, the relevant rules were such that their interpretation may not have been evident to the complainant, as indicated above. Moreover, as highlighted by the Ombudsman at the time of the friendly solution proposal, no conclusive evidence had been produced to show that EFSA had sufficiently informed the complainant about the relevant rules. In addition to that, EFSA omitted to address some of the elements on which the Ombudsman had relied in this context. In particular, EFSA commented neither on the form actually signed by the complainant nor on the announcement apparently made in the 'Newcomer's Road Book'. Finally, and contrary to EFSA's suggestion, making an *ex gratia* payment would not be contrary to the principles of sound financial management or equal treatment since, as emphasised by the Ombudsman, such payment would not establish a precedent.

**66.** In this respect, the Ombudsman wishes to recall that, according to the Ombudsman's well-established decisional practice, while failure to respect legal obligations is a form of maladministration, the concept of maladministration is broader than the concept of legality. [6] It is therefore perfectly possible for maladministration to occur even where an institution complies with its legal obligations. In the Ombudsman's view, this is precisely what happened in the present case. Whereas EFSA's decision to recover the installation allowance from the complainant was in conformity with the law, it failed to consider whether this decision should not be reconsidered or modified in view of the circumstances of the case. This constitutes an instance of maladministration.

**67.** Although the Ombudsman is disappointed with EFSA's position as far as the present complainant is concerned and regrets that EFSA did not make use of the proposal for a friendly solution made in this case to reconsider its position, she takes note of the fact that EFSA has in the meantime amended its practice in this respect. In fact, it appears that since 2012, EFSA



pays the installation allowance only at the end of the probationary period. It is only upon the express request from the staff member concerned that EFSA would now consider making an advance payment prior to the end of the probationary period. This change in EFSA's administrative practice should ensure that problems such as the one that occurred in the present case will not occur again in the future. In view of the above, there is no need for the Ombudsman to make a draft recommendation in the present case. The Ombudsman therefore closes her inquiry with a critical remark.

## B. Conclusion

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

**It is good administrative practice for an institution to ensure that its decisions are both in conformity with the law and take proper account of all relevant circumstances. When EFSA decided to recover in full the complainant's installation allowance in the present case, it failed to take into due account a number of circumstances that suggested that a different solution would have been appropriate. This constitutes an instance of maladministration.**

The complainant and EFSA will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 12 December 2013

[1] See, *inter alia*, Case T-180/98 *Cotrim v Cedefop* [1999] SC-I-A-207 and SC-II-1077, para. 32, Case T-156/96 *Jensen v Commission* [1998] SC-I-A-411 and SC-II-1173, para. 63, and Case T-122/95 *Chabert v Commission* [1996] SC-I-A-19 and SC-II-63, para. 32.

[2] Decision of the European Ombudsman closing his inquiry into complaint 2226/2009/(ANA)(BB)(TS)TN against the European Police College (CEPOL), point 29.

[3] Pursuant to Articles 24 and 92 of the Conditions of Employment of Other Servants of the EU, contract agents will receive an installation allowance as provided for in Article 5 of Annex VII to the Staff Regulations.

[4] See, for instance, *Jensen v Commission*, *Cotrim v Cedefop* and *Chabert v Commission* (cited above).

[5] See Case T-123/89 *Chomel v Commission* [1990] ECR II-131, paragraphs 28-30; *Cotrim v Cedefop*, cited above, paragraph 34.



[6] See, for instance, point 80 of the decision of the European Ombudsman closing his inquiry into complaint 1017/2010/(VL)MMN against the European Parliament; point 82 of the [decision of the European Ombudsman closing his inquiry into complaint 1560/2010/\(ML\)FOR against the European Anti-Fraud Office \(OLAF\)](#) [Link].