

Proposal of the European Ombudsman for a friendly solution in the inquiry into complaint 1851/2012/OV against the Research Executive Agency (REA)

Solution - 28/09/2012

Case 1851/2012/OV - **Opened on** 28/09/2012 - **Decision on** 04/09/2014 - **Institution concerned** European Research Executive Agency (Friendly solution) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. This complaint concerns the non-payment of part of the fees of an expert who acted as a reviewer for the Research Executive Agency (REA).

2. The complainant is a radiation protection expert. In May 2010, Mr X, a REA official, contacted the complainant to see whether he was available as a reviewer for the "HEDRad project" [2] . Further informal contacts took place.

3. On 10 December 2010, the complainant sent an e-mail to the REA official, stating that he guessed that the work would require about 40 hours and asking what compensation he could expect for it.

4. By e-mail of the same day, the REA official replied as follows:

" The reimbursement for project review is not that much but is tax free. You will receive 450 Euros per day.

The total number of days is written in your contract (max 5 days) but in general you will be paid 1.5 days: one day for reading and 0,5 for drafting your report ... but for Central Review [this is the review meeting in Brussels] you get one day more so it will be 2.5 days if we go on site ".

5. On 22 December 2010, the REA sent to the complainant the Appointment Letter which the complainant signed on 28 December 2010. The Specific Conditions more particularly provided the following:



" *You are invited to perform your tasks between the dates of 17/01/2011 and 16/01/2012, for a total number of days not exceeding 5 days .*

This maximum number of days includes :

1 day(s) to perform remote reading and analysis of the grant agreement and the project, and other background information and deliverables at your home or place of work.

1 day(s) for attending the review meeting(s) of the HEDRad project taking place at Brussels, Belgium, on 18/01/2011.

0.5 day(s) to draft review report(s) remotely at your home or place of work and, to submit your report(s) by 10 working days after the reception of reports and deliverables at the latest. ... "

6. The complainant completed his review, but did not attend the review meeting in Brussels. The REA informed him on 27 April 2011 that he would be paid only 1.5 days. On 28 May 2011, he submitted the application form for reimbursement, indicating 4 working days (for tasks not involving journeys) x EUR 450. He thus claimed a total amount claimed of EUR 1800.

7. On 4 January 2012, the complainant sent a registered letter to the European Commission against REA's decision of 27 April 2011 to pay him only 1.5 days. The complainant referred to Mr X's e-mail of 10 December 2010 according to which a maximum of 5 days would be paid. The complainant then quoted from the Specific Conditions of the appointment letter, and argued that it did not mention that a maximum of 1 day would be paid for reading and analysis and maximum 0.5 day for reporting. He stated that the REA's interpretation was in contradiction with the text of the Specific Conditions. He also argued that, in reality, he had spent much more time than the 40 hours which he had proposed in his offer, and that he therefore wanted to be paid at least 4 days at EUR 450/day. The complainant also pointed out that he would never have accepted the job had he known at the time this allegedly erroneous interpretation by the REA.

8. On 24 January 2012, the REA replied that, by having signed the Appointment Letter, the complainant had accepted its terms and conditions, including the Specific Conditions, according to which the complainant was to perform his task as a reviewer " *for a total number of days not exceeding 5 days* ". The REA stated that the complainant had explicitly committed himself to perform the tasks under the following conditions: 1 day to perform reading and analysis of the grant agreement, the project and other background information; 0.5 day to draft a review report remotely and to submit it. The REA concluded that it could not pay additional days to the complainant on the basis of the fact that he spent more time than the time to which he had committed himself by signing the Appointment Letter. The REA finally informed the complainant that, should he wish to contest the payment decision, he could submit a complaint to the European Ombudsman or lodge a case before the General Court.

The subject matter of the inquiry



9. On 11 September 2012, the complainant complained to the Ombudsman, making the following allegation and claim:

Allegation:

The REA was wrong in refusing to reimburse the complainant's fees of EUR 1 800.

Claim:

The REA should reimburse the complainant's fees of EUR 1 800.

10. In his letter asking the REA to submit an opinion on the allegation and claim, the Ombudsman also asked it to reply to the following question: "In relation to the above allegation and claim, could the REA clarify why it considers that the complainant could claim only 1.5 working days, when the Specific Provisions of the appointment letter stated that the complainant was invited to perform his tasks " *for a total number of days not exceeding 5 days* " and that " *this maximum number of [5] days includes : 1 day(s) to perform remote reading and analysis0.5 day(s) to draft review report(s) remotely ...* ". It would appear that the wording " *this maximum number of [5] days includes* " implies that the total number of working days that could be claimed was *not limited* to these 2.5 days (or 1.5 days in the case of the complainant who did not attend the central review meeting in Brussels), otherwise the first mentioned maximum of 5 working days would make no sense. Also, the wording does not appear to exclude the possibility that the specific number of working days for each task was a minimum (which could be exceeded provided the combined number of working days did not exceed 5 days)."

The inquiry

11. The complaint was forwarded to the REA for an opinion. The REA sent its opinion on 15 January 2013. The opinion was then forwarded to the complainant, who sent her observations on 7 February 2013.

The Ombudsman's analysis and provisional conclusions

A. Allegation that the REA wrongly refused to pay the complainant's fees

Arguments presented to the Ombudsman

12. In support of his allegation that the REA had wrongly refused to reimburse his fees of EUR 1 800, the complainant made two arguments:



i) The REA wrongly interpreted the text of the Specific Conditions of the Appointment Letter. The complainant argued that the Specific Conditions provide that a maximum of 5 working days will be reimbursed and that in these five days are included 1 day and 0.5 days for, respectively, remote reading and analysis of the grant agreement and the project, and, drafting a review report remotely and submitting it. The Specific Conditions do *not say* that a maximum of 1 day and a maximum of 0.5 days for the above tasks will be reimbursed.

ii) The REA has intentionally misled the complainant by withholding information from him on its interpretation of the Specific Conditions. The complainant argued that the REA's official must already have known of this allegedly wrong interpretation of the Specific Conditions on 10 December 2010, and that, had the complainant known this interpretation at that time or before signing the Appointment Letter, he would not have accepted the job offer.

13. In its opinion, the REA stated that, by signing the Appointment Letter, the complainant committed himself to assist the REA as a "reviewer" under the terms and provisions laid down in the Appointment Letter, including, among others, the general conditions of payment.

14. The REA quoted the Specific Conditions of the Appointment Letter (see above under paragraph 5). It argued that these provisions do not state that the complainant has been required (and had agreed) to work for five days and that he had acquired the right to be paid for these five days. The REA stated that the "total number of X days", in this case "not exceeding 5 days", is a standard provision laid down in the model Appointment Letter adopted by Commission Decision C(2008)4143 on the basis of the model provided for evaluators in the rules for proposals submission, evaluation selection and award procedures for indirect actions under the FP7, as last amended by Commission Decision of 28 February 2011 [3] . The REA has a standard practice of including additional days to cover unforeseen and unpredictable tasks and events (for instance, when there is a lack of collaboration of the partners on the reviewed project requiring an extension of the review work performed on-site). In that way the REA can avoid i) additional administrative work such as amending or issuing a new Appointment Letter and ii) having the expert to perform tasks without being covered by an Appointment Letter.

15. The REA stated that a breakdown of the assignment into various tasks (each with a specified number of days to perform the work) was outlined in the Specific Conditions of the Appointment Letter, and thus provided information on the entitlements for reimbursement for the work to be performed. The REA considered that it had correctly applied the specific conditions of the Appointment Letter.

16. In reply to the complainant's second argument that the REA intentionally misled him by withholding information on its interpretation of the Specific Conditions, the REA stated that, before signing the Appointment Letter, the complainant had been made aware of the fact that he would be paid for 1.5 days (one day for reading/analysis and 0.5 day for drafting the report) or for 2.5 days if he attended the review meeting. After the confirmation of these specific conditions by the Project Officer in his e-mail of 10 December 2010, the complainant signed the



Appointment Letter on 28 December 2010. The REA argued that it had provided all the requested information related to the calculation and payment of the expert's fees in due time and that the allegation that it had intentionally misled the complainant was unfounded. It stated that it could not be held responsible for the unfounded misinterpretation by the complainant of the Project Officer's reply of 10 December 2010.

17. In his observations, the complainant stated that the phrase "*This maximum number of [5] days includes: 1 day(s) to perform remote reading and analysis ...*" could be read either as maximum 1 day or minimum 1 day. The complainant argued that it is more sensible to understand that it means a minimum one day: this implies that the REA expects the reviewer to give minimum attention to the tasks.

18. In relation to his second argument that he had been intentionally misled, the complainant quoted from Mr X's e-mail of 10 December 2010 ("*the total number of days is written in your contract (max 5 days) but in general you will be paid 1.5 days: one for reading and 05 for drafting your report in SESAM. But for Central Review you get one day more so it will be 2.5 days if we go on site*"). The complainant argued that Mr X should have omitted the words "*in general*" from his reply. The complainant maintained that the REA had intentionally misled him. He argued that the reference to maximum 5 days should have been omitted. It only created an illusion and Mr X knew very well on 10 December 2010 that the REA would not pay up to 5 days.

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

19. The Ombudsman notes that the Appointment Letter (including the Specific Conditions), which was signed by the complainant on 28 December 2010 constitutes the agreement between the complainant and the REA and thus prevails over the earlier e-mail correspondence between the complainant and the REA. The present dispute concerns the number of working days the complainant could claim (against a lump sum payment of EUR 450 per day). The complainant is of the view that he is entitled to payment of 4 days (EUR 1800), whereas the REA considers that he is entitled to payment of only 1.5 days (EUR 675).

20. The Specific Conditions of the Appointment Letter state that the complainant was invited to perform his tasks for "*a total number of days not exceeding 5 days*" and that "*this maximum number of [5] days includes : 1 day(s) to perform remote reading and analysis of the grant agreement and the project ..., 1 day for attending the review meeting(s) [which the complainant didn't] 0.5 day(s) to draft review report(s) remotely ... and, so submit your report(s) ...*".

21. The Ombudsman notes that, according to the above provisions, the maximum number of working days that could be claimed was **5 days**, and that this maximum of 5 days **includes** 1, 1 and 0.5 days (in sum, a total of 2.5 days) for the specific tasks mentioned. However, understood literally, the wording "*includes*" does not imply that the total number of working days that could be claimed for these tasks was limited to a maximum of 2.5 days (or to 1.5 days where a reviewer did not attend the central review meeting in Brussels). The wording could also imply that experts could charge for other days above the 2.5 days, provided they were duly



justified and never exceeded the maximum of 5 days. If the REA intended that reviewers could claim only a *maximum* of 2.5 days for all the tasks (and thus not a maximum 5), then it should have stated so clearly in the Specific Conditions. It failed to do so.

22. In his letter requesting an opinion on the complaint, the Ombudsman asked the REA to specifically explain why it considers that, on the basis of the text of the Specific Conditions as it stood, the complainant could not claim more days. In its opinion, the REA merely explained that it has a standard practice of including additional days to cover unforeseen and unpredictable tasks and events. However, even with this explanation, the situation remains unclear from the point of view of the expert who signs the Appointment Letter and can only rely on the text of the Specific Conditions included in the Appointment Letter.

23. In light of the above, the Ombudsman makes the preliminary finding that the REA's position that the complainant could claim only 1.5 working days is not in line with the provisions of the Specific Conditions. The Ombudsman also considers that, in order to avoid similar uncertainty with regard to how many working days reviewers can claim, it should review the Specific Conditions and clearly set out the maximum number of days that can be claimed. The Ombudsman will therefore make a corresponding proposal for a friendly solution below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

24. As regards the complainant's argument that the REA had intentionally misled him by withholding information on its interpretation of the Specific Conditions, the Ombudsman notes that REA's official could indeed have been more clear in his e-mail of 10 December 2010 as regards the payment conditions. However, there is no reason for supporting the complainant's view that the REA wished intentionally to mislead him. No further inquiries into this question are therefore necessary.

B. The proposal for a friendly solution

1. On the basis of the text of the Specific Conditions, the REA should consider paying the complainant for 4 working days at a rate of EUR 450 per day.

2. The REA should consider revising the Specific Conditions in the model Appointment Letter in order to make it perfectly clear to reviewers the maximum number of working days for which they can claim.

Emily O'Reilly

Done in Strasbourg on 14/04/2014

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The goal of the HEDRad project is to develop digital computed radiography technology.



[3] Commission Decision (2011/161/EU, Euratom) of 28 February 2011 amending Decision C(2008) 4617 related to the rules for proposals submission, evaluation, selection and award procedures for indirect actions under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) and under the Seventh Framework Programme of the European Atomic Energy Community (Euratom) for nuclear research and training activities (2007-2011), OJ 2011 L 75, p. 1.