European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 131/2009/ELB against the European Network and Information Security Agency

Decision
Case 131/2009/ELB - **Opened on** 28/01/2009 - **Decision on** 23/11/2010

The background to the complaint

1. The complainant signed a three-year temporary agent contract to work for the European Network and Information Security Agency (ENISA). The complaint concerns an invalidity procedure [1] launched by the complainant.

2. The complainant alleged that he suffered moral harassment from a colleague in ENISA and, as a result of this harassment, he had to take sick leave.

3. Subsequently, the complainant requested that his case be referred to the Invalidity Committee, in accordance with Article 78 of the Staff Regulations and Article 33 of the Conditions of Employment of Other Staff (CEOS). ENISA informed the complainant that the invalidity procedure had been opened. Due to various difficulties relating to this procedure, the complainant decided to turn to the Ombudsman. He lodged the present complaint against ENISA and, in addition, a complaint against the European Commission (complaint 3399/2008/ELB).

The subject matter of the inquiry

4. The complainant alleged that ENISA delayed the opening of the invalidity procedure.

The inquiry

5. On 22 December 2008, the complainant addressed his concerns to the Ombudsman. On 28 January 2009, the Ombudsman opened an inquiry and forwarded the complaint to ENISA, which sent its opinion to the Ombudsman. The opinion was forwarded to the complainant, who then submitted his observations.

6. On 26 November 2009, the Ombudsman made a friendly solution proposal to ENISA. On 29 January 2010, ENISA replied to the Ombudsman's proposal. The reply was forwarded to the complainant, who then submitted his observations on 23 March 2010.

The Ombudsman's analysis and conclusions

Preliminary remarks

7. The Ombudsman would like to repeat the following preliminary remarks, which he made in his friendly solution proposal. In the course of the invalidity procedure, the doctor appointed by ENISA, and the doctor appointed by the complainant, respectively, would have had to provide the names of independent doctors to give their opinion on the complainant's condition. In his observations, the complainant stated that the Director of ENISA may have had access to correspondence between the doctor appointed by ENISA and the doctor appointed by the complainant. The complainant argued that the Director of ENISA knew the names of the independent doctors suggested by both doctors. He argued that this constitutes a serious breach of medical confidentiality. The Ombudsman notes that this allegation was not mentioned in the original complaint. Moreover, the complainant does not seem to have made any prior administrative approaches to ENISA regarding this new allegation. Therefore, the Ombudsman takes the view that this allegation cannot form part of the present inquiry.

8. The President of the European Court of Justice appointed the third doctor. The complainant made several criticisms relating to the third doctor, one of which was to question the latter's qualifications. The complainant stated that he had not been permitted to make observations before the President of the Court of Justice made his decision. The Ombudsman would like to point out that the present inquiry concerns the actions of ENISA, and that the actions of the President of the European Court of Justice fall outside the scope of the present inquiry.

A. Alleged delay in the opening of the invalidity procedure

Arguments presented to the Ombudsman

9. The complainant requested that his case be referred to the Invalidity Committee, in accordance with Article 78 of the Staff Regulations and Article 33 of the CEOS. ENISA forwarded the complainant's request to the Paymasters Office of the Commission (PMO). ENISA subsequently admitted that it had made a mistake in doing so, and stated that it had decided to deal with the complainant's request. Then, ENISA refused to open the invalidity procedure, stating the following: " *We do not think it appropriate to open invalidity proceedings immediately at the moment, before seeing the result of any possible future checks under Article 59(1)* " [2] . The complainant's lawyer reminded ENISA that, in view of the judgment in Case

F-119/05 *Gesner/OHMI* [3] , ENISA had no margin of discretion, and was obliged to open the procedure. This meant appointing a doctor, providing the Invalidity Committee with the complainant's medical file, and defining the Invalidity Committee's mission, in accordance with Article 33 of the CEOS. The complainant's lawyer sent an e-mail to ENISA after the complainant had undergone a medical examination carried out by the Commission's doctor. According to the complainant, ENISA attempted to use this medical examination in order to avoid opening the invalidity procedure. The Commission's doctor did, in fact, conclude that the complainant was able to work. Having received no reply to a previous e-mail, the complainant's lawyer informed ENISA's Management Board of the complainant's views. No reply was received. The complainant's lawyer then decided to lodge an Article 90(2) complaint. Finally, ENISA informed the complainant that the invalidity procedure had been opened.

10. ENISA explained that the complainant alleged that he was being harassed by a colleague. ENISA's Management Board carried out an internal administrative inquiry into the alleged harassment with the help of the Commission's Investigation and Disciplinary Office (IDOC). It concluded that there had been no harassment.

11. The complainant underwent a medical examination carried out by the Commission's medical service. A second medical examination resulted in him being considered well enough to go back to work. The complainant challenged this decision and asked for a medical arbitration procedure. The arbitration procedure concluded that the complainant could go back to work and carry out 50% of his duties if he were to work in Brussels, and not in Heraklion, Greece, where ENISA is located.

12. According to ENISA, its various actions should not be interpreted in such a way as to prove that it wished to use the medical examination procedure to delay opening the invalidity procedure. When ENISA was informed of the results of the administrative inquiry into the alleged harassment, it decided to investigate the complainant's state of health. It had not done so for a year because of the ongoing administrative inquiry. ENISA pointed out that it had wished to obtain updated medical data, and its reasons for doing so had nothing to do with opening the invalidity procedure. In fact, ENISA stated that the second medical examination, and the results of the arbitration procedure, had nothing to do with its decision to open an invalidity procedure. It explained that the two procedures had run in parallel.

13. ENISA explained that the delay in opening the invalidity procedure was normal in a procedure involving several institutions. It added that it had never denied the complainant's right to be examined by an invalidity committee, nor had it imposed additional prior conditions in respect of such an examination. It stated that the complainant's request of October was received in November. In the few weeks remaining before the end of the year, it had to contact various persons to set up the Invalidity Committee. It added that this was a new procedure for ENISA, which meant that it had to learn exactly how to proceed. Since the pre-Christmas period is not a very favourable time to launching a new procedure, most of the preparatory work was carried out in mid-January. This is what led to the decision to open the procedure in March. ENISA noted the four months which had elapsed between the complainant's request and the opening of the procedure. It considered this to be a reasonable amount of time, and that it was

within the time-limit imposed by Article 90 of the Staff Regulations. ENISA claimed that this shows it acted with due diligence in the present case.

14. ENISA pointed out that it was not responsible for any malfunctioning of the Invalidity Committee, since it has no right to intervene in its operations, given that any such action might be perceived as an attempt to influence the Invalidity Committee's conclusions.

15. In his observations, the complainant stated that there had been no reason for ENISA to contact the PMO, since the PMO had no role to play in an invalidity procedure. He challenged the explanations put forward by ENISA, noting that it had found time to summon him to a medical examination, but had, so it claimed, no time to appoint a doctor to represent it on the Invalidity Committee. He added that the timing of the medical examination was significant since, if the medical examination resulted in his being judged fit to go back to work, this could be used as a justification not to open the invalidity procedure. After examining him, Dr G. concluded that he could go back to work on a part-time basis. He was, however, advised to avoid any contact with those colleagues whom he considered to be a source of harassment. This conclusion was wrongly interpreted by Dr A., who decided that he could go back to work, provided he could work seven days, and then spend seven days in Belgium. The second medical opinion was examined by a third doctor, Dr O., who confirmed that it was absolutely impossible for the complainant to go back to work in Heraklion, and consequently suggested that he should work part-time in Brussels. This third opinion was wrongly interpreted by ENISA, which again concluded that he could go back to part-time work in Heraklion. The complainant concluded, therefore, that the purpose of the medical examination was to block the invalidity procedure.

16. The complainant disagreed with ENISA's comment that it could not intervene in the functioning of the Invalidity Committee. He pointed out that ENISA had done so on previous occasions.

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

17. The Ombudsman noted that the invalidity procedure is governed by Article 33 of the CEOS for temporary staff, which states the following:

"1. A servant who is suffering from total invalidity and who, for that reason, is obliged to suspend employment with the institution shall be entitled, for as long as the invalidity lasts, to an invalidity allowance...

2. Invalidity shall be established by the Invalidity Committee provided for in Article 9 of the Staff Regulations."

18. Article 7 of Annex II to the Staff Regulations deals with the Invalidity Committee and states the following:

"The Invalidity Committee shall consist of three doctors:

- one appointed by the institution to which the official concerned belongs;

- one appointed by the official concerned; and

- one appointed by agreement between the first two doctors…

In the event of failure to agree on the appointment of a third doctor within two months of the appointment of the second doctor, the third shall be appointed by the President of the Court of Justice of the European Communities at the request of one of the parties concerned."

According to Article 9 of Annex II to the Staff Regulations, "[t] *he official may submit to the Invalidity Committee any reports or certificates from his regular doctor or from any medical practitioners whom he may have consulted. The Invalidity Committee's conclusions shall be communicated to the appointing authority and to the official concerned. The proceedings of the Committee shall be secret.* "

19. First, the Ombudsman noted that the complainant made his request in October, and that ENISA opened the procedure in March, that is, more than four months after the request was made.

20. The Ombudsman further noted ENISA's explanations for this delay in opening the procedure:

• the lack of knowledge within ENISA about the invalidity procedure, and the need to consult several institutions;

• the time of year, that is, November, which was not favourable for opening such a procedure.

21. In view of the fact that ENISA started operating only in September 2005, and given its limited number of staff (56 employees in 2007 [4]), the Ombudsman agreed that ENISA might have lacked knowledge about invalidity procedures and that it thus needed to consult other institutions.

22. The Ombudsman believed that ENISA's lack of knowledge might explain why it wrongly referred the matter to the PMO. The PMO administers, calculates, and pays the financial entitlements [5] of Commission staff, and the staff of certain other Community institutions and bodies, but is not involved in invalidity procedures.

23. The complainant argued that the medical examination enabled ENISA further to delay the opening of the invalidity procedure. ENISA considered that there was no connection between the two events. The Ombudsman noted that this medical examination was carried out after the complainant's request had been submitted, and after the conclusion of IDOC's inquiry. He further noted that, according to Article 59(1) of the Staff Regulations, " *the official may at any*

time be required to undergo a medical examination arranged by the institution. " In November, ENISA refused to open the invalidity procedure, referring to checks it wished to carry out under Article 59(1). According to the case-law of the European Union Courts [6] , the Appointing Authority has to open an invalidity procedure unless it has at its disposal objective and unchallenged information to prove that the substantial conditions of Article 78(1) of the Staff Regulations [7] , as set out in Article 13(1) of Annex VIII to the Staff Regulations [8] , are not met. The Ombudsman noted, therefore, that, while ENISA was fully entitled to arrange the medical examination in question, it was not entitled to delay the invalidity procedure unless it already had at its disposal "objective" and "unchallenged" information relating to the medical status of the concerned party. This condition cannot be fulfilled by a medical examination which had yet to be carried out, and whose results were not yet known.

24. Principles of good administration require an administration to act within a reasonable time to resolve issues which are brought to its attention. ENISA argued that a four-month time limit is reasonable, given that this is the time limit for a reply to an Article 90 request [9] . The Ombudsman pointed out that, in order to determine whether a time limit is reasonable, account has to be taken of the particular circumstances of the case, for instance, its complexity, its importance for the parties involved, the action to be taken, and the overall context [10] . He noted that the procedure was of great importance for the complainant. Moreover, the main action required of ENISA was for it to appoint a doctor. In the Ombudsman's view, there was no reason for ENISA to have waited until January before taking action regarding the invalidity procedure.

25. In light of the above, the Ombudsman made the preliminary finding that ENISA unduly delayed opening the invalidity procedure by failing to take any action before January. Such delay amounted to an instance of maladministration. He therefore made the following proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman:

Taking into account the Ombudsman's findings, ENISA could apologise to the complainant for having delayed the opening of the invalidity procedure.

The arguments presented to the Ombudsman after his friendly solution proposal

26. First, ENISA noted that it never referred to Article 90(2) of the Staff Regulations as the legal basis to justify the deadline for handling the request to establish an Invalidity Committee. It stated that it had only referred to Article 90(1) of the Staff Regulations, which provides that the Appointing Authority shall reply within four months to a request made by an official or an agent. Moreover, the request to establish an Invalidity Committee cannot be obtained by lodging an Article 90(2) complaint. ENISA admitted that the deadline for both paragraphs is identical. However, their aim differs substantially. According to the case-law of the European Union Courts, Article 90(2) aims to resolve conflicts which may arise between the administration and officials. For that reason, it is called the pre-litigation stage. The deadline provided for in Article

90(1) is necessary to deal with a request from an official or an agent. Hence, the intention of the legislator is to set a reasonable deadline, namely, four months, to enable the administration to take necessary measures and provide the official with a reply within a short period. Thus, ENISA maintained that it was justified in using the four-month deadline to deal with the complainant's request, as stated in its opinion to the Ombudsman. ENISA stated that it needed the four months to gather information before replying to the request.

27. ENISA underlined again that the complainant's lawyer had recognised unequivocally that a four-month deadline was reasonable. Consequently, given that the complainant accepted the statutory deadline and raised no objections as long as his request was dealt with within that deadline, it cannot be concluded that the time which ENISA took to open the invalidity procedure constituted maladministration and that it led to a loss for the complainant.

28. ENISA did not neglect the importance of the procedure for the complainant. On the contrary, it complied with its duty of care by ensuring the smooth conduct of the procedure. ENISA hoped that the Ombudsman would compare the four-month deadline to establish the Invalidity Committee, with the 20 months that had elapsed since the Invalidity Committee was established, a fact the Ombudsman did not address in his assessment.

29. In light of the above, ENISA concluded that it could not accept the Ombudsman's proposal for a friendly solution.

30. In his reply, the complainant regretted the position taken by ENISA, since he had accepted that his complaint could be resolved by means of an apology despite the fact that, initially, he had expected more from ENISA. He had demonstrated his willingness to reach a compromise. He noted the theoretical nature of ENISA's comments, which again showed a defensive position.

31. The complainant stated that ENISA had not submitted any new arguments. He considered that it referred to the four-month deadline as a way of justifying its delay in dealing with his request. The complainant noted that this explanation was given retrospectively since, initially, it had refused to open an invalidity procedure. He pointed out that he sent his request by e-mail in October, and that he could not understand why it was not received until November, that is, 12 days after being sent, and, coincidentally, just four months before ENISA decided to open the invalidity procedure. He concluded that ENISA had not offered a convincing explanation for its delay in handling a simple request which required no specific consultation, and no special resources.

32. The complainant concluded that the Ombudsman should find that there was maladministration by ENISA and that he had suffered loss as a result of that maladministration. First, he suffered a moral loss. Second, he suffered a material loss in view of the fact that he never received an invalidity allowance. All he received were EU unemployment benefits and, subsequently, national unemployment benefits.

The Ombudsman's assessment after his friendly solution proposal

33. The Ombudsman regrets that ENISA was unable to accept his proposal for a friendly solution, thereby missing an opportunity to put right an instance of maladministration. This is all the more unfortunate given the nature of the friendly solution, which was for ENISA to make an apology, and in light of the goodwill shown by the complainant.

34. The Ombudsman has consistently taken the view that maladministration is a broad concept. To be sure, good administration requires compliance with legal rules and principles. However, good administration goes further. It requires EU institutions and bodies, not only to respect their legal obligations, but also to act in a reasonable and proportionate manner [11] .

35. ENISA considered that it acted within a reasonable deadline, given that it acted within four months, which is the deadline granted for replying to Article 90(1) requests. The Ombudsman underlines that non-compliance with the four-month deadline to reply to an Article 90(1) request means that the request is implicitly rejected, and that a complaint under Article 90(2) may be introduced. Similarly, under Article 90(2), the authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint is lodged. If the authority fails to act in this way, the person concerned is protected from further delay by the rule that the lack of reply constitutes a negative decision. These rules are intended to protect the citizen where an administration does not comply with its legal obligations. However, these rules do not give the administration the right to depart from the obligations arising from the principles of good administration. The Ombudsman repeats that, according to principles of good administration, an administration must act within **a reasonable time** to resolve issues which are brought to its attention. He maintains that it is not the case that ENISA needed more than four months to complete the simple task of obtaining information on the invalidity procedure. He sees no reason why ENISA should have waited until January to carry out preparatory work after receiving the complainant's request which was made in October.

36. ENISA argued that it strictly complied with the four-month deadline by replying in March to a request received in November. Given the complainant's observation that he sent his request in October by e-mail and that it is highly likely that it must, therefore, have been received the same day, there are some doubts regarding these dates.

37. ENISA indicated that, in a letter [12] , the complainant's lawyer agreed that a four-month deadline was reasonable. The Ombudsman has a different understanding of that letter in which he notes that the following was stated: " *I consider that* [my client's] *request should have been treated* **without any delay** *...* [F] *our months have now passed...without any decision of the competent authority...* [B] *y its silence at the expiry of four-month formal* [deadline] *, ENISA has already taken a - negative - decision on this request... Consequently, I ask, on behalf of* [my] *client* [for] *:*

The annulment of the implicit refusal to open the invalidity procedure and [the submission of my client's] *request to an invalidity committee;*

The opening of the requested the invalidity procedure and the submission of [my client's] *case and request to an invalidity committee without any further delay...* " (Emphasis added)

The Ombudsman's understanding of the above is that the complainant's lawyer complained about the delay with which ENISA dealt with her client's request. She did not consider a four-month deadline to be reasonable, and she merely referred to the fact that four months had elapsed. The Ombudsman's understanding is confirmed by the complainant's observations on ENISA's reply to the friendly solution proposal.

38. The Ombudsman points out that his inquiry into the complaint against ENISA deals only with the opening of the invalidity procedure. The procedure in itself, including its length and its conclusions, are not part of the present inquiry.

39. The Ombudsman therefore concludes that ENISA unduly delayed the opening of the invalidity procedure and that this constitutes maladministration. He will therefore make a critical remark below.

B. Conclusions

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

ENISA unduly delayed the opening of the invalidity procedure.

The complainant and ENISA will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 23 November 2010

[1] An invalidity procedure aims to determine whether an official or agent is medically fit to perform his or her duties.

[2] Article 59(1) of the Staff Regulations states the following: "1. An official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave...The official may at any time be required to undergo a medical examination arranged by the institution."

[3] Case F-119/05 *Gesner v OHMI* , judgment of 16 January 2007, not yet reported in the ECR.

[4] Report of the European Court of Auditors on the annual accounts of the European Network and Information Security Agency for the financial year 2007 together with the Agency's replies (OJ C 311, 5.12.2008).

[5] Salaries and allowances, reimbursement of experts and mission expenses, health insurance and accident cover, pensions and unemployment.

[6] Case T-284/07 P *OHIM v López Teruel* , judgment of 26 November 2008. Paragraph 82 in the original French version states the following: " *… l'AIPN est en droit de contrôler si l'une des conditions pour l'exercice de sa compétence liée n'est pas remplie, sans pour autant jouir d'une marge d'appréciation. En effet, … l'AIPN, qui n'est pas compétente pour effectuer des appréciations d'ordre médical, est tenue de donner suite à une demande de convocation de la commission d'invalidité sauf dans l'hypothèse où elle disposerait d'éléments objectifs et non contestés excluant que les conditions de fond de l'article 78, premier alinéa, du statut, telles que précisées par l'article 13, paragraphe 1, de l'annexe VIII du statut, soient réunies.* "

[7] Article 78 of the Staff Regulations states the following: " *An official shall be entitled, in the manner provided for in Articles 13 to 16 of Annex VIII, to an invalidity allowance in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his function group.* "

[8] Article 13(1) of Annex VIII to the Staff Regulations states the following: " *Subject to the provisions of Article 1 (1), an official aged less than sixty-five years who at any time during the period in which he is acquiring pension rights is recognised by the Invalidity Committee to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who is obliged on these grounds to end his service with the Communities, shall be entitled, for so long as such incapacity persists, to [an] invalidity allowance as provided in Article 78 of the Staff Regulations.* "

[9] In his friendly solution proposal, the Ombudsman wrongly referred to an Article 90 complaint, it should have been an Article 90 request.

[10] Decision on complaint 568/98/PD. See also Case T-394/04 *Angeletti v Commission* [2006], not published, paragraph 162.

[11] Findings of maladministration by the Ombudsman do not, therefore, automatically imply illegal behaviour which could be sanctioned by a court. See Annual Report of the European Ombudsman 2008, p. 29 and, in this context, Joined cases T-219/02 and T-337/02 *Olga Lutz Herrera v Commission* [2004] ECR-SC IA-319, II-1407, paragraph 101 and Case T-193/04 R *Hans-Martin Tillack v Commission* [2006] ECR-II-3995, paragraph 128.

[12] By this letter, the complainant's lawyer introduced an Article 90(2) complaint against the implicit rejection of the complainant's request.