Decision of the European Ombudsman closing the inquiry into complaint 2132/2012/OV against the European Parliament

Decision
Case 2132/2012/OV - **Opened on** 20/11/2012 - **Recommendation on** 29/08/2014 - **Decision on** 18/02/2015 - **Institution concerned** European Parliament (Draft recommendation accepted by the institution) |

The case concerned the dismissal of a parliamentary assistant by Parliament, following a request to do so by the MEP for whom the assistant worked. The Ombudsman concluded that Parliament's failure to include the MEP's request in the complainant's personal file, in addition to its failure to hear the complainant before the dismissal, constituted an instance of maladministration. She therefore recommended that Parliament should make good the instance of maladministration by making an ex gratia payment. The Ombudsman also recommended that Parliament should systematically include in the personal files of parliamentary assistants a copy of an MEP's request to terminate the contract. Parliament accepted both recommendations and proposed to make an ex gratia payment of EUR 1500 to the complainant. The Ombudsman therefore considers the complaint resolved.

The background

1. The complainant was an accredited parliamentary assistant to a Member of the European Parliament (MEP). On 27 February 2012, Parliament received a request from the MEP to terminate the complainant's contract. Two days later, by letter of 29 February 2012, Parliament informed the complainant of the MEP's request and of its decision to terminate the complainant's contract. Parliament stated that the MEP gave the following reasons for requesting his dismissal: i) he was no longer satisfied with the quality of the complainant's work; ii) the complainant did not function well within the team; and iii) the MEP could therefore no longer trust the complainant to be his accredited parliamentary assistant.

2. On 18 July 2012, the complainant inspected his personal file at Parliament's premises in Luxembourg. When he noticed that the request whereby the MEP had asked for his dismissal was not in his personal file, he asked Parliament's services to show him a copy of the request. Parliament refused access and stated that the request was not a letter but a standard form filled in by the MEP. On 1 August 2012, the complainant lost his job. Subsequently, he turned to the

Ombudsman.

Allegation of wrong dismissal

The Ombudsman's draft recommendations

3. The Ombudsman opened an inquiry into the **allegation** that Parliament had wrongly terminated the complainant's contract, and the **claim** that it should annul this decision. The Ombudsman did not deal with the reasons for the complainant's dismissal and explained this to the complainant.

4. The Ombudsman stated that she could not accept Parliament's arguments that (i) there is no obligation to hear a parliamentary assistant before the decision to end his/her contract is taken, and that (ii) since the facts on which the decision is based are stated therein, the inclusion of the MEP's request for dismissal in the parliamentary assistant's personal file would serve no purpose.

5. As regards Parliament's argument (i), the Ombudsman stated that Parliament should have taken into account the Charter of Fundamental Rights, which was in force at the time of the complaint's dismissal. Article 41(2)(a) of the Charter provides that *every person* has the right to be heard, before *any individual measure* which would affect him or her adversely is taken. Indeed, in its judgment in *CH* v *European Parliament* concerning the termination of a parliamentary assistant's contract following a request by an MEP, the Civil Service Tribunal held that, since the entry into force of the Treaty of Lisbon on 1 December 2009, the provisions of the Charter, which have the same legal value as the Treaties, should be taken into account [1] . The Ombudsman underlined that in that case, the Civil Service Tribunal annulled Parliament's decision terminating the parliamentary assistant's contract, since Parliament had not respected the assistant's right to be heard following the request for dismissal by the MEP and before the dismissal decision was taken.

6. As regards Parliament's argument (ii), the Ombudsman pointed out that Article 26 of the Staff Regulations, which also applies to accredited parliamentary assistants, provides that *all documents* concerning the administrative status of staff members and *all reports* relating to their ability, efficiency and conduct are to be included in the personal file. The Ombudsman did not see why the MEP's request should not be considered to constitute such a document. Moreover, the MEP's loss of trust in the assistant, even though being a valid reason for the dismissal, is not an abstract concept but needs to be translated in concrete terms in the request. It follows that transparency and fairness would require Parliament to include such a request in the assistant's personal file.

7. On the basis of the above considerations, the Ombudsman concluded that Parliament's failure to include the MEP's request in the complainant's personal file, in addition to Parliament's failure to hear the complainant before his dismissal, negatively affected the complainant's right

to be heard. This constituted an instance of maladministration. She therefore made the following draft recommendations:

" *1. Parliament should enter into direct contact with the complainant in order to agree how to make good the instance of maladministration, identified in paragraph* [7] *above, for instance by making an ex gratia payment of an appropriate amount.*

2. The Ombudsman welcomes the new Implementing Measures adopted by the Bureau of Parliament on 14 April 2014. The new wording of Article 20 underlines Parliament's commitment to respect parliamentary assistants' rights of defence and to guarantee, in a situation where the employment is based on mutual trust, that contracts are terminated in the fairest way possible. However, in order to further guarantee the rights of defence of parliamentary assistants, Parliament should adopt an internal practice that it systematically includes in the personal files of parliamentary assistants a copy of the request by the MEP to terminate their contract ".

8. In its detailed opinion, Parliament accepted both draft recommendations. In reply to the *first draft recommendation* , Parliament stated that it had written to the complainant on 5 November 2014 to give him the opportunity to decide whether or not he wished the MEP's request to terminate his contract to be included in his personal file. In that letter, Parliament also informed the complainant that, if he decided that the request should be included in his personal file, he had the right to ask that his comments on this document also be included in his personal file, in accordance with Article 26(b) of the Staff Regulations.

9. Parliament also apologised to the complainant for not having heard him before his dismissal. Since this procedural irregularity could no longer be rectified, Parliament proposed to pay compensation of 1 500 EUR to the complainant in recognition of the non-material damage he suffered as a result of this procedural error. However, in the light of the information available to it, Parliament considered that the reasons invoked in the dismissal decision to justify the loss of trust were valid. The complainant had not demonstrated that the reasons invoked for his dismissal were vitiated by a manifest error of fact or of assessment. Therefore, even if the complainant had been heard during the dismissal procedure, the outcome of this procedure would not have been different. Parliament also stated that the proposed amount corresponded to the amount of compensation recently awarded by the Civil Service Tribunal to an applicant whose right to be heard had been violated by the European Commission in a case where the Civil Service Tribunal concluded that, in the absence of the violation of the right to be heard, the procedure would not have led to a different result [2] .

10. In reply to the *second draft recommendation* , Parliament stated that it had decided to *systematically* include in the personal file of parliamentary assistants a copy of the request by the MEP to terminate their contract. It pointed out that, according to Article 20(4) of the Implementing Measures adopted by the Bureau of Parliament on 14 April 2014, when the authority empowered to conclude contracts of employment (the "AECE") receives from an MEP a request for termination of the contract of an accredited parliamentary assistant, the AECE invites the assistant to an interview in order to inform him/her of the reasons given by the Member in the request for termination and to take note of any comments the assistant wishes to

make. A copy of the request by the MEP to terminate the assistant's contract will be sent to the assistant with the invitation for an interview. In this invitation, the AECE will also inform the assistants that the request for termination of their contract will be included in their personal file and that they have the right to ask that their comments on that request also be included in their personal file, in accordance with Article 26(b) of the Staff Regulations.

11. In his observations, the complainant stated that the level of compensation proposed by Parliament (EUR 1 500) was not likely to cover the moral prejudice he had suffered. He pointed out that, in other instances, the level of compensation granted by the Union courts was much higher. For instance, in its judgment in Case F-129/12 *CH* v *European Parliament,* which also concerned the dismissal of a parliamentary assistant, the Civil Service Tribunal ordered Parliament to pay the assistant a sum of EUR 50 000 for the non-material harm suffered [3] . In Case F-42/13 *CU* v *EESC* [4] , the Civil Service Tribunal ordered the European Economic and Social Committee to make a payment of EUR 25 000 to the applicant.

12. The complainant also stated that he was surprised by Parliament's statement that, on the basis of the available information, it considered that the reasons invoked in the dismissal decision justifying the loss of trust were valid and that, therefore, even if the complainant had been heard during the dismissal procedure, the outcome of this procedure would not have been different. The complainant referred to the judgment of 2 July 2014 in which the Civil Service Tribunal held: "[e] *n effet, cet argument revient à vider totalement de sa substance le droit fondamental d'être entendu, consacré à l'article 41, paragraphe 2, sous a), de la Charte, c'est-à-dire la possibilité donnée au requérant d'exprimer son point de vue sur une mesure l'affectant défavorablement, dès lors que le contenu du droit fondamental d'être entendu implique que l'intéressé ait la possibilité d'influencer le processus décisionnel en cause (arrêt Marcuccio/Commission, T-236/02, EU:T:2011:465, point 115), ce qui est de nature à garantir que la décision à adopter n'est pas entachée par des erreurs matérielles et constitue le résultat d'une mise en balance appropriée de l'intérêt du service et de l'intérêt personnel de la personne concernée* " [5] .

13. The complainant stated that he had, and still has, many grounds that he could rely upon to challenge the dismissal decision.

14. The complainant concluded that, in light of the similarity of this case with the two cases mentioned above (F-129/12 and F-42/13 [6]), Parliament should have annulled its decision terminating the contract as it was manifestly illegal and, consequently, should have reinstated the complainant or paid equivalent compensation. He also considered that the compensation to be granted, which should cover both the material and moral prejudice, should be consistent and commensurate with that of the case-law mentioned above. Only such fair and justified compensation would allow the complainant to consider the case closed.

The Ombudsman's assessment after the draft recommendations

15. The Ombudsman welcomes Parliament's acceptance of both draft recommendations and the measures taken to implement them.

16. As regards the *first draft recommendation* , the Ombudsman notes that Parliament not only agreed to make an ex gratia payment of EUR 1 500 to the complainant, but also invited the complainant to indicate whether he wished the MEP's request to terminate his contract, as well as any comments he might wish to make on that request, to be included in his personal file. By doing so, Parliament also implemented, with regard to the complainant, the Ombudsman's second draft recommendation, which was general in nature.

17. The complainant's observations focus on the amount of the ex gratia payment proposed by Parliament. In this context, the complainant refers to two cases (Case F-129/12 *CH* v *European Parliament* and Case F-42/13 *CU* v *EESC*) in which the Civil Service Tribunal ordered Parliament and EESC to pay EUR 50 000 and EUR 25 000 in compensation respectively.

18. The Ombudsman points out that, unlike those court cases in which the parties claimed compensation for the damage suffered, the Ombudsman's draft recommendation was not aimed at compensating the complainant for any damage allegedly suffered, but at making good the instance of maladministration identified above by way of an *ex gratia* payment, that is to say, a payment without an admission by Parliament of its legal liability and without creating a precedent. However, since the Ombudsman's recommendation to Parliament was to make an *ex gratia* payment of an *appropriate* amount, the Ombudsman needs to assess whether the amount of EUR 1 500 proposed by Parliament is appropriate.

19. The Ombudsman notes in this context that the amounts of compensation awarded in those two court cases cannot simply be applied to the complainant's situation. In Case F-129/12, which also concerned the termination of a parliamentary assistant's contract following a request by the employing MEP, the Civil Service Tribunal ordered EUR 50 000 to be paid in compensation. However, the specific circumstances of that case need to be considered. In fact, in that case, the Tribunal annulled both the decision to terminate the applicant's contract and Parliament's decision to reject a request for assistance that the applicant, who alleged that she had been harassed by the MEP concerned, had made. In its judgment, the Tribunal explicitly referred to what it called the 'questionable circumstances' in which both of the above decisions had been taken. It is thus clear that the facts in Case F-129/12 are very different from those in the complainant's case.

20. In Case F-42/13 *CU* v *EESC* , which concerned the termination of a temporary agent contract, the Civil Service Tribunal also annulled the decision to terminate the applicant's contract. The Tribunal further ordered EESC to pay EUR 25 000 in compensation in view of what it called the manifest illegality of that decision, given that EESC had infringed both Article 41(2) (a) *and* (c) of the Charter. In the complainant's case, the Ombudsman found that the complainant's rights to be heard had not been respected and that Article 41(2)(a) had thus been infringed by Parliament. However, the Ombudsman did not find an infringement of Article 41(2)(c) of the Charter (concerning the obligation to state reasons), but found that Parliament had properly given reasons for its decision to terminate the complainant's contract. The facts of

Case F-42/13 thus also differ from those in the complainant's case.

21. Given the constructive way in which Parliament reacted to her draft recommendations, and taking into account that what she had asked Parliament to do was to make an *ex gratia* payment and not to provide compensation for damage that the complainant might have suffered, the Ombudsman considers that the amount of EUR 1 500 proposed by Parliament is appropriate. The complainant is, of course, free to submit a claim for damages to Parliament, should he consider that he has suffered damage exceeding the amount Parliament offered to him as an *ex gratia* payment. If Parliament were to fail to provide a satisfactory answer to such a request, the complainant could consider turning to the Civil Service Tribunal.

22. In his observations, the complainant made several comments in which he contested the dismissal as such. In this context, the Ombudsman can only reiterate what was said in the Ombudsman's letter of 20 November 2012 opening the present inquiry, namely that the recruitment and the dismissal of parliamentary assistants by an MEP (through Parliament's administration) is based on a relationship of trust and that the loss of trust of an MEP in his/her parliamentary assistant is a valid reason for terminating the contract.

23. By analogy with what the General Court has held in Case T-406/04 *Bonnet* v *Court of Justice,* the existence of a relationship of trust between an MEP and a parliamentary assistant means that neither the Court nor the Ombudsman could substitute its or her judgement for that of the MEP on the relationship of trust between the MEP and his/her assistant. The Ombudsman also fails to see how, as the complainant claimed, Parliament could have reinstated the complainant in the service of an MEP who had lost trust in him.

24. However, and also by analogy with Case T-406/04, when a parliamentary assistant is dismissed, not only the EU Courts but also the Ombudsman can examine whether the dismissal decision taken by Parliament is in line with the applicable procedure and respects the rights of defence and the obligation to provide reasons. Similarly, without substituting their assessment for that of Parliament, the EU Courts can verify whether the loss of trust has been effectively invoked and whether the arguments do not infringe fundamental rights.

25. In this case, the Ombudsman fully dealt with the complainant's rights of defence in her draft recommendation. As also mentioned in the Ombudsman's letter of 20 November 2012, the Ombudsman cannot substitute her assessment of whether there actually was a loss of trust between the two parties for that of the MEP concerned or of Parliament.

26. As regards the **second draft recommendation** , the Ombudsman is of the view that Parliament's decision systematically to include in the personal file of parliamentary assistants a copy of the request by the MEP to terminate the contract will help to further guarantee the rights of defence of the assistants.

Conclusion

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

Parliament accepted both recommendations made by the Ombudsman and has thus resolved the complaint.

The complainant and Parliament will be informed of this decision.

Emily O'Reilly

Strasbourg, 18/02/2015

[1] Case F-129/12 *CH* v *European Parliament* , judgment of 12 December 2013, not yet published in the ECR, paragraph 37.

[2] Case F-91/13 *DF* v *Commission,* judgment of 1 October 2014, not yet published in the ECR, paragraphs 55 to 57.

[3] Op.cit., paragraph 65.

[4] Case F-42/13 *CU* v *European Economic and Social Committee* , judgment of 22 May 2014, not published in the ECR, paragraphs 58 and 59.

[5] Case F-63/13 *Psarras* v *ENISA,* judgment of 2 July 2014, not yet published in the ECR, paragraph 41. The Tribunal held that this argument has the effect of rendering meaningless the fundamental right to be heard set out in Article 41(2)(a) of the Charter, that is to say, the opportunity given to every person to express his or her point of view on a measure adversely affecting him or her, since the purpose of the fundamental right to be heard implies that the person concerned should have the possibility of influencing the decision-making process in question (judgment in T-236/02 *Marcuccio* v *Commission* , EU:T:2011:465, paragraph 115), which is likely to ensure that the decision to be adopted is not vitiated by material errors and is the outcome of an appropriate balancing of the interests of the service and the personal interests of the person concerned.

[6] The complainant pointed out that Case F-91/13 invoked by Parliament does not relate to a serious decision of termination of contract, but to a case of recovery of overpayments.